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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 245

THE UNITED STATES, PETITIONER

vs.

THE ALGOMA LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 2, 1938
CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES, PETITIONER

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THE ALGOMA LUMBER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

87106—38——1

1 In the Court of Claims

No. M–109

ALGOMA LUMBER COMPANY, A CORPORATION, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I, *Petition*

Filed April 1, 1931

To the Honorable Chief Justice and the Judges of the Court of Claims:

The plaintiff Algoma Lumber Company; respectfully represents:

1. That the plaintiff is, and at the times hereafter referred to was, a corporation organized and existing under the laws of the State of California with its principal office and place of business in Los Angeles, California.

2. That on July 28, 1917, defendant, acting through the superintendent of the Klamath Indian School, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855–857), en-

2 tered into a contract with the plaintiff for the sale to the plaintiff of all of the merchantable dead timber, standing or fallen, and all of the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service upon an area of approximately 15,700 acres, being a part of the Indian Reservation near Klamath Falls, Oregon, the boundaries of which are described as follows:

"Beginning at the ¼ corner of Section 35, Township 32 South and Section 2, Township 33 South, Range 7 East, thence South one-half mile; thence West one mile; thence South one-half mile; thence West one mile; thence South one-half mile; thence West one-half mile; thence South one mile; thence West 1¾ miles to reservation line in Section 18, Township 33 South, Range 7 East; thence North along reservation line for approximately ten miles to Sand Creek; thence in an Easterly direction along the border of the Lodge pole pine on the South side of Sand Creek to a point near the corner of Sections 26, 27, 34, and 35, Township 31 South, Range 7 East, thence in a Southerly and Southeasterly direction along the edge of the Lodge pole pine to the Southeast corner of Section 35, Township 32 South, Range 7 East, thence West one-half mile to the place of the beginning;"

a copy of said contract marked Exhibit A being hereto attached and made a part hereof.

3. That the provisions of said contract with respect of the

3 price to be paid to the superintendent of the Klamath Indian

School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians for timber cut and removed under said contract are as follows:

"For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

"For the period ending March 31, 1920, Three Dollars and Fifty-seven Cents per thousand feet board measure for yellow pine (including so-called bull pine) and sugar pine and Fifty Cents per thousand feet board measure for white fir.

"For the three-year periods of the contract term, beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

* * * * * * * *

"This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of the unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"The timber will be paid for in advance payments of not less than $10,000.00 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500.00. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School."

4. That the cash deposits required by said contract have been made from time to time.

5. That said contract provides a method for an adjustment by the Commissioner of Indian Affairs for the three-year periods beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, the provisions of the contract in this respect being as follows:

"It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three-year periods after April 1, 1920, shall be deter-

5 mined after a careful consideration of the cost of logging operations and of lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

"As a basis for comparison in a readjustment of the prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three-year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five Cents ($15.75) for yellow pine (including bull pine and sugar pine), and Thirteen Dollars and Fifty Cents ($13.50) for white fir."

6 6. That under the last above quoted provision of said contract the Commissioner of Indian Affairs gave notice and did fix the price of yellow pine and sugar pine timber at $4.24 per thousand feet, which price became effective April 1, 1920, and correspondingly did give notice and did fix the price of yellow pine and sugar pine timber under said contract at $4.90 per thousand feet, which price became effective April 1, 1923, and correspondingly did, prior to April 1, 1926, notify the plaintiff that no increase in the price of said yellow pine or sugar pine timber would be made by said Commissioner as of April 1, 1926, and that by reason of such fixing of the price for said timber as of date April 1, 1926, under and in accordance with the terms of the contract, said price remained established and could not be changed by the Commissioner of Indian Affairs until and upon due notice, and not before April 1, 1929.

7. That during the three years directly preceding January 1, 1928, there was no increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California, neither was there any such increase during the three years directly preceding January 1, 1929, nor was there any such increase during the three years directly preceding January 1, 1930.

8. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract

to make any increase in the price of yellow pine or sugar pine
7 timber for the year commencing April 1, 1928; but, nevertheless, prior to said date said Commissioner gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1928, of $.40 per thousand feet, making said price $5.30 per thousand feet.

9. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine at any price in excess of $4.90 per thousand feet, but defendant refused to heed such protest and appropriated moneys, deposited by the plaintiff, at the rate of $5.30 per thousand feet; that during said year the plaintiff cut under said contract 25,677,248 feet of yellow pine and sugar pine timber, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's money on deposit with it the sum of $.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Ten Thousand, Two Hundred Seventy and 90/100th Dollars ($10,270.90).

10. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract to make any increase in the price of yellow pine or sugar pine timber for the year commencing April 1, 1929; but, nevertheless, prior to said date
8 said Commissioner gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1929, of $.40 per thousand feet, making said price $5.30 per thousand feet.

11. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine timber at any price in excess of $4.90 per thousand feet but defendant refused to heed such protest and appropriated moneys deposited by the plaintiff at the rate of $5.30 per thousand feet; that during said year beginning April 1, 1929, plaintiff cut under said contract 31,975,280 feet of yellow pine and sugar pine timber for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of $.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Twelve Thousand, Seven Hundred Ninety and 11/100ths Dollars ($12,790.11).

12. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract to make any increase in the price of yellow pine or sugar pine timber for the year commencing April 1, 1930; but, nevertheless, prior to said date said Commissioner gave notice that he would make, and

subsequently attempted to make effective an increase in the
9 price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1930, of $.40 per thousand feet, making said price $5.30 per thousand feet.

13. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine timber at any price in excess of $4.90 per thousand feet but defendant refused to heed such protest and appropriated moneys, deposited by the plaintiff, at the rate of $5.30 per thousand feet; that during said year the plaintiff cut under said contract 5,083,870 feet of yellow pine and/or sugar pine timber, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of $.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Two Thousand, Thirty-three and 55/100ths ($2,035.55) Dollars.

14. That although restitution thereof has been demanded by plaintiff, defendant has refused, and still refuses, to return to plaintiff the said sums so unlawfully collected from it, which amount in the aggregate to Twenty-five Thousand, Ninety-four and 56/100ths ($25,094.56) Dollars.

15. That plaintiff is a citizen of the United States and has at all times borne true allegiance to the Government thereof and has not
10 in any way aided, abetted, or given encouragement to any of the enemies of the said Government, and that the facts as stated in this petition are true.

16. That no other action as aforesaid has been had on this claim in Congress or any other department of the Government; that plaintiff is the sole owner of this claim, and the only person interested therein; that no assignment or transfer thereof, or any part thereof, or of any interest therein, has been made, and that plaintiff is fully entitled to the amount herein claimed from the United States after the allowance of all just credits and off-sets.

WHEREFORE, plaintiff prays judgment for said sum of Twenty-five Thousand, Ninety-four and 56/100ths ($25,094.56) Dollars, and such other and further relief as to the court plaintiff may appear to be entitled.

[SEAL]

ALGOMA LUMBER COMPANY,
By E. J. GRANT, *President.*
CARL D. MATZ,
Attorney for Plaintiff.

[*Duly sworn to by E. J. Grant; jurat omitted in printing.*]

Subscribed and sworn to before me this 27th day of March, 1931.

HAROLD S. MORRISON,
Notary Public.

My commission expires October 21, 1931.

Exhibit A to petition

TIMBER CONTRACT, MIDDLE MT. SCOTT UNIT, KLAMATH INDIAN RESERVATION

This agreement, made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July, 1917, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855–857), and the Regulations and instructions for Officers in charge of forests on Indian reservations, approved June 29th, 1911, as amended March 17th, 1917, between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and The Algoma Lumber Company of Algoma, State of Oregon, party of the second part.

Witnesseth: That the party of the first part agrees to sell to the said Algoma Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber, marked or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately two hundred fifty million feet board measure, log scale, of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine), and about ten million
12 feet of white fir, located upon the designated area of approximately 15,700 acres as hereinafter described.

For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure, Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

For the period ending March 31, 1920, Three Dollars and fifty-seven cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine and Fifty cents per thousand feet board measure for white fir.

For the three year periods of the contract term, beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lum-

ber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the
13 purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

As a basis for comparison in a readjustment of the prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents ($15.75) for yellow pine (including bull pine and sugar pine) and Thirteen Dollars and Fifty cents ($13.50) for white fir.

It is agreed by the party of the first part that the cutting of white fir shall be optional with the purchaser, except that trees of these species, containing fifty per cent merchantable timber which are seriously injured in the logging operations shall be taken or paid for.

And Algoma Lumber Company, party of the second part, further agrees to cut and remove the said timber in strict accordance with the following conditions and all Regulations governing timber sales prescribed by the Secretary of the Interior:

1. The term "Officer in Charge," whenever used in these Regulations, signifies the Officer designated by the Commissioner of
14 Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. The sale includes an area of approximately 15,700 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

"Beginning at the ¼ corner of Section 35, Township 32 South, and Section 2, Township 33 South, Range 7 East; thence South ½ mile; thence West one mile; thence South ½ mile; thence West one mile; thence South ½ mile; thence West ½ mile; thence South one mile; thence West 1¾ miles to reservation line in Section 18, Township 33 South, Range 7 East; thence North along reservation line for approximately ten miles to Sand Creek; thence in an easterly

direction along the border of the lodge pole pine on the south side of Sand Creek to a point near the corner of Sections 26, 27, 34, and 35, Township 31 South, Range 7 East, thence in a southerly and southeasterly direction along the edge of the lodge pole pine to the southeast corner of Section 35, Township 32 South, Range 7 East, thence West ½ mile to the place of beginning."

The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of the unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than $10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

5 to 25. omitted.

Omitted portions of contract have to do entirely with method of selection, cutting, scaling, and transportation of timber; piling and burning of brush; general fire prevention; location of logging roads, camps, and mills, and similar detail.

26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

28. All books pertaining to the logging operations and the milling business of the purchaser, will be open to inspection with the understanding and agreement that any information obtained through such inspection shall be considered confidential and, without the consent

of the purchaser, shall not be disclosed to anyone except those connected with the government service.

29. No member of or delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (See Sections 114 and 116, Act of March 4th, 1909, entitled "An Act to Codify, Revise, and Amend the Penal Laws of the United States," 33 Stat. 1088, 1109), and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract (See Executive Order of May 18, 1905). The cutting or removal of timber from Indian Lands in breach of the terms of any contract, and without other lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by Section 6 of the Act of June 25th, 1910 (36 Stat. L. 855, 857).

30. As a further guarantee of a faithful performance of this contract, the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of forty thousand dollars ($40,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and
17 requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

ALGOMA LUMBER COMPANY,
F. P. FAY, *Vice-Pres.*
(*Signature of Purchaser.*)
ALGOMA LUMBER COMPANY,
E. J. GRANT,
(*Signature of Purchaser.*)
J. M. JOHNSON,
(*Superintendent, Klamath Indian School.*)

Witnesses:
H. E. CHURCHILL.
GEO. V. HORR.

Approved:
C. E. BRESETTE,
C. A. WALKER,
Sept. 14, 1917.
S. G. HOPILUIS,
Assistant Secretary.

18 II. *History of proceedings.*

On May 11, 1931, the defendant filed a general traverse to plaintiff's petition.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court June 12, 1934, and, on the same day, the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following order on said plea:

ORDER

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December, 1934, that said plea be and the same is overruled without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

III. *Argument and submission of case*

On October 8, 1937, this case was argued and submitted on merits by Mr. Carl D. Matz and Mr. William S. Bennet, for plaintiff, and by Mr. James J. Sweeney, for defendant.

19 IV. *Special findings of fact, conclusion of law and opinion of the court, by Williams, J.*

Filed Jan. 12, 1938

Messrs. Carl D. Matz and William S. Bennet for the plaintiff. Mr. Jesse Andrews was on the briefs.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for the defendant.

The court, upon the report of a commissioner and the evidence, makes the following

Special findings of fact

1. Plaintiff is now, and at all times hereinafter mentioned has been, a corporation organized under the laws of the State of California, with its principal place of business in Los Angeles, California.

2. On March 21, 1917, the Assistant Secretary of the Interior approved a form of contract and regulations, and also a form of advertisement, for the sale of about 250,000,000 feet of pine (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir, upon approximately 15,700 acres, within Townships 31, 32, and 33 South, Range 7 East, on what is known as Middle Mount Scott Unit, Klamath Indian Reservation, Klamath, Oregon. The form of contract, as approved, provided that it would extend for a period of 15 years from April 1, 1917.

The advertisement required that sealed bids be addressed to
20 the Superintendent of the Klamath Indian School, Klamath,

Agency, Oregon. Bids were received until 12 o'clock noon, on May 31, 1917. Each bidder was required to state in his bid, for each species, the amount per thousand feet, Scribner decimal C log scale, to be paid for all timber cut prior to April 1, 1920. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs, by three-year periods. Prospective bidders were informed that no bid less than $3.25 per M feet for yellow and sugar pine, or 50¢ for white fir, for the first period, would be considered. Bids were required to be submitted in triplicate, and accompanied by a certified check on a solvent national bank, in favor of the Superintendent of the Klamath Indian School, in the amount of $5,000.

3. On May 28, 1917, plaintiff, in response to the published invitation for bids, made its proposal, addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow and sugar pine at $3.57, and white fir at 50¢. A certified check in the sum of $5,000, drawn on the First National Bank of Los Angeles, California, payable to the Superintendent of the Klamath Indian School, accompanied the proposal.

In said proposal plaintiff stated:

"If our bid is accepted and we shall fail to fulfill our agreement in accordance with the regulations governing the sale, the amount of this check shall be forfeited to the use and benefit of the Klamath Indians."

4. Plaintiff's bid was the lower of the two bids received, and on June 4, 1917, the Special Agent in Charge of the Klamath Indian School forwarded to the Commissioner of Indian Affairs an abstract of the bids received, and recommended that plaintiff's bid be accepted. On June 25, 1917, the Assistant Secretary of the Interior approved the recommendation made by the Commissioner of Indian Affairs on June 16, 1917, that the bid of the Algoma Lumber Company be accepted, and on the same day advised the Special Agent in Charge of the Klamath Indian School, of the acceptance of plaintiff's bid, and directed him to prepare the contract and bond, and submit it to the Department. On June 25, 1917, plaintiff was advised of
21 the acceptance of its bid, and that the Special Agent in Charge of the Klamath Indian School had been directed to prepare the contract and bond.

5. The contract was entered into July 28, 1917, and approved by the Assistant Secretary of the Interior on September 14, 1917.

The contract designated the parties thereto and the subject matter thereof as follows:

"TIMBER CONTRACT, MIDDLE MT. SCOTT UNIT, KLAMATH INDIAN RESERVATION

"This agreement made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July 1917, under authority of the Act of Congress of June 25, 1910 (26 Stat. L. 855–857), and

the Regulations and instructions for Officers in charge of forests on Indian reservations, approved June 29th, 1911, as amended March 17th, 1917, between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and The Algoma Lumber Company of Algoma, State of Oregon, party of the second part.

"Witnesseth: That the party of the first part, agrees to sell to the said Algoma Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately two hundred fifty million feet board measure log scale of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine) and about ten million feet of white fir, located upon the designated area of approximately 15,700 acres as hereinafter described.

"For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

"For the period ending March 31, 1920, Three Dollars and
22 fifty-seven cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine and Fifty cents per thousand feet board measure for white fir."

"For the three year periods of the contract term, beginning April 1, 1920, April 1, 1923 April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

"It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920; February 1, 1923; February 1, 1926; February 1, 1929.

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

"As a basis of comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents ($15.75) for yellow pine (including bull pine and sugar pine), and Thirteen Dollars and Fifty cents ($13.50) for white fir.

* * * * * * *"

The contract also contained the following provisions:

93 "2. The sale includes an area of approximately 15,700 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

* * * * * * *

"The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell, and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area at the prices fixed for unallotted land.

"3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"4. The timber will be paid for in advance payments of not less than $10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500. The amount deposited with the accepted bid will

be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

* * * * * * *

"23. The purchaser will pay for damage to property of the Indians growing out of his operations under the sale. The purchaser shall comply with all Regulations relative to the maintenance of order on Indian reservations. Indian labor shall be employed in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

"24. The title to the timber covered by the contract shall not pass to the purchaser until it has been paid for and scaled, measured, or counted.

24 "25. All questions relative to the location of railroad spurs, the exact areas to be logged, the location of all structures, and the requirements to be observed in their construction and other matters concerned with the operations of the purchaser upon the sale area shall be settled by the officer in charge. Final decisions as to points involved in the interpretation of the Regulations and provisions of the contract governing the sale, cutting, and removal of the timber shall be rendered by the Secretary of the Interior. Work may be suspended by the officer in charge if the terms of the contract are disregarded, and the violation of any one of such terms, if persisted in, shall be sufficient cause for the revocation of the contract and the cancellation of other permits and privileges.

"26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

"27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

"28. All books pertaining to the logging operations and the milling business of the purchaser will be open to inspection at any time by an officer authorized by the Commissioner of Indian Affairs to make such inspection, with the understanding and agreement that any information obtained through such inspection shall be considered confidential, and, without the consent of the purchaser, shall not be disclosed to anyone except those connected with the Government service.

* * * * * * *

"30. As a further guarantee of a faithful performance of this contract, the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of forty thousand dollars ($40,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder."

6. A penal bond in the sum of $40,000, executed by individual sureties, was furnished by plaintiff on December 21, 1917, to guarantee the performance of the contract. By the terms of said
25 bond the individual sureties obligated themselves to pay to the United States the penal sum therein named, on condition that the obligation of the bond would be inoperative in the event that plaintiff faithfully observed all the laws and regulations made for the governing of trade and intercourse with the Indians, and complied with the regulations and terms of the contract.

7. The regulations, approved June 29, 1911, as amended March 17, 1917, prescribed in detail the procedure to be followed in the administration of the sale of timber on Indian reservations. The declared purpose of the regulations was to so manage "the Indian forests as to obtain the greatest revenue for the Indians consistent with the proper protection and improvement of the forests."

Section 17 of the regulations prescribed that sales, involving a stumpage value of not exceeding $50,000, might be made from unallotted land, by the Commissioner of Indian Affairs, or from allotments, with his approval. Sales involving a stumpage value exceeding $50,000, should be made only with the express approval of the Secretary of the Interior.

Paragraph 23 of the amended regulations, approved March 17, 1917, provided in substance for the deduction of 8% of the gross proceeds derived from the sale of timber. This sum of 8% was deducted for the purpose of defraying the administrative expenses incidental to the sale of timber and was considered in the Superintendent's cash account as "Individual Indian Money Timber Expense." The remaining 92% was paid to the allottee, or his heirs, or deposited to the credit of the parties entitled thereto, as required by said regulations.

8. The first adjustment period under the contract commenced on April 1, 1920.

The contract required that notice of the new schedules be determined and given to the purchaser on or before February 1, 1920. In order for the Commissioner to determine the new schedule and give the notice required on February 1 of each year of the price adjustment period specified in the contract, it was necessary for plaintiff, and other timber operators, whose contracts were subject
26 to the same price adjustment schedule, to furnish the Commissioner with data respecting cost of production and selling prices for the three years preceding January 1 of each year in which such new schedule of prices was fixed. Plaintiff experienced some delay in furnishing the required cost and sales price data, and as early as January 23, 1920, advised the Commissioner that it had intended asking for a revision downward, on account of the grades running lower than he had originally estimated and represented.

On March 29, 1920, the Commissioner wired plaintiff as follows: "Reconsideration of all data submitted by you and others confirms

view expressed in office wire of February nineteenth that advance of sixty-seven cents per thousand feet on Mount Scott Unit is justifiable, effective April one, nineteen twenty. Should investigation at close of nineteen twenty convince me that this price is too high, reduction may be made for nineteen twenty-one and nineteen twenty-two."

On March 30, 1920, plaintiff replied, by letter, to the Commissioner's wire, advising him that it was prepared to accept the advance of 67¢; that its greatest objection was not that the increase did not seem to be justified by present conditions, but that the United States Forest Service had made no increase on March 1, 1920, on a timber unit very close to the one operated by plaintiff, that contractor being its largest competitor in the District. The second paragraph of said letter stated:

"We note that you are prepared to make a reduction for 1921–1922 should an investigation at the close of 1920 convince you that the price is too high, and we wish to thank you for this promise of additional concession should conditions warrant."

On April 5, 1920, the Commissioner addressed a letter to the Superintendent of the Klamath Indian School, advising of the 67¢ increase on the Middle and Southern Mount Scott Units, effective April 1, 1920, and stating that the decision had been reached after a full consideration of all information presented by the Algoma and Lamm Lumber Companies, and by the Superintendent and Forestry
27 employees specifically detailed to gather information respecting the cost of production and selling prices during the years 1916 and 1919, inclusive; that while the data indicated that there had been a very marked increase in selling prices during the years 1917, 1918, and 1919 over the average price prevailing in 1916, it also showed a very large increase in the cost of production, and that the 67¢ increase, effective April 1, 1920, was based upon calculations that gave the companies credit for the full amount of the advance in production costs during 1917, 1918, and 1919, over the average production cost for 1916. The Superintendent was requested to have made, by timber men specially detailed for that purpose, a thorough study of production costs and lumber prices in the Klamath Region during the year 1920, for the purpose of determining whether the increase in the stumpage prices should be applicable during the years 1920 and 1921.

9. The second price adjustment period under the contract commenced on April 1, 1923.

On December 22, 1922, Mr. Lee Muck, Supervisor of Forests, was directed to proceed to the Klamath Indian Reservation, early in January, for the purpose of making a thorough study of the situation and recommending what increases, if any, should be made in the stumpage prices during the three years following April 1, 1923, in the Middle Mount Scott Unit, under the terms of the contract, to properly protect the interests of the Indians.

On January 3, 1923, the Commissioner advised plaintiff by letter that Mr. Muck had been assigned to make a special study of lumber costs and prices in the Klamath District. Plaintiff was asked to cooperate with the Department's representative, in order that the Commissioner might be in a position to determine, with fairness to all parties, what advances in stumpage prices, if any, should be made on April 1, 1923. Plaintiff was asked to notify the Commissioner not later than January 15, 1923, whether it would waive its right under the contract to receive notice of the proposed readjustment of prices prior to February 2, 1923, and allow until March 1, 1923, for such notice. The request for additional time was made be-
28 cause of the apparent inability of the plaintiff and other operators to furnish complete data for the calendar year 1922, until late in January.

On January 8, 1923, plaintiff advised the Commissioner of its waiver to receive said notice until March 1, 1923, and expressed the opinion that present conditions did not warrant any increase in prices, in view of the heavy increase which was made three years before, and the fact that the margin of profit had decreased rather than increased during the last three years.

As required by the terms of the contract, the Commissioner, on February 27, 1923, advised plaintiff, by telegram, that he had concluded that the stumpage rate for pine on Middle Mount Scott Unit should be increased 66¢ on April 1, 1923, making the new contract price $4.90 per M feet, and that the price of white fir should be increased 25¢, making the price for that species 75¢ after April 1, 1923.

On February 28, 1923, the plaintiff, by telegram to the Commissioner, protested said advance, and asked for a rehearing, stating that it could not see how the rise in price was justified either by the experience of the past three years, or by the prospects for the next three years, although the then present market was temporarily very high. On March 1, 1923, the Commissioner advised the plaintiff that he would be pleased to consider any information or argument that plaintiff might present to him prior to April 1, 1923.

On March 24, 1923, plaintiff addressed a letter to the Commissioner, referring to its previous protest respecting the proposed 66¢ rise in price on Middle Mount Scott Unit, and advised that, after looking into the matter more carefully, it wished to withdraw its protest provided it could obtain an understanding that the matter would be reviewed on or about the first of April 1924, or 1925, in case the market dropped to such an extent that the recent rise would work a great hardship upon it. The plaintiff stated that it felt that deflation, common to nearly all industries, was coming to the lumber industry, and that the last two heavy advances in the price of stumpage might make the operation of its unit extremely unprofitable. The plaintiff stated that a further reason for the
29 protest made by it was that competing companies operating

close to the Middle Mount Scott Unit on timber units controlled by the United States Forest Service had obtained stumpage prices more advantageous than those obtained by plaintiff. It stated, however, that as compared with other units on the Klamath Reservation, it had not been treated unfairly and that it might be possible, at the present rather inflated values in the lumber business, to make a reasonable profit at the new stumpage prices, provided such prices continue for a sufficient length of time.

On April 5, 1923, the Commissioner acknowledged the receipt of plaintiff's letter of March 24, 1923, and stated that the office understood plaintiff's letter to mean that it considered the advanced price of $4.90 per M feet for yellow and sugar pine to be satisfactory on the basis of the market that had existed during the preceding three years; that plaintiff would ask reconsideration only on condition that there should occur thereafter such a marked decline in lumber values as to make the company's operation an unprofitable one, on the basis of the then existing stumpage price; that reference to the two dates, April 1, 1924, and April 1, 1925, was taken to mean that plaintiff might desire a revision downward of the price effective April 1, 1924, if there should occur a very marked decline of lumber prices during the year beginning April 1, 1923; and that should a serious depression occur during the year beginning April 1, 1924, plaintiff would expect the price to be lowered during the year beginning April 1, 1925. The Commissioner, in said letter, advised plaintiff that he considered its position a reasonable one and that he would be pleased to give consideration to the whole problem if conditions during the years beginning April 1, 1923, and April 1, 1924, disclosed that the new price of $4.90 per M feet was an unreasonable one.

The Commissioner, in said letter, also advised plaintiff of his appreciation of its attitude at the time of the former readjustment, and also at the present one, and stated that:

"The purpose of the office in increasing stumpage prices has consistently been that of securing to the Indians every advantage to which they are justly entitled under the terms of the contract, and at the same time giving the fullest consideration to the legitimate interests of the purchaser of the timber. The office understands fully the uncertainty involved in the management of an operation so extensive as that of the Algoma Lumber Company and is desirous to maintain at all times a sympathetic interest in the success of those who are assisting in the realization of adequate prices for Indian timber."

10. The third price adjustment period provided by the contract commenced on April 1, 1926.

On December 22, 1925, the Commissioner advised plaintiff that his office had been unable to obtain, in sufficient time, the information from the plaintiff and other operators on Klamath lands upon which the readjustment should be based to make a final determination of the readjusted prices prior to February 1 of any year in which the

adjustment was to be made. Plaintiff was asked if it would consent to such notice being given on February 28, 1926.

By letter to the Commissioner dated January 2, 1926, the plaintiff consented to the requested extension of time. The letter contained the following statement:

"As rapidly as possible we will get our own records in such shape that you will have our results for the past year, and we believe we have already furnished you our results for the years 1923 and 1924. These results are such that certainly no increase in prices can be made without subjecting us to further severe losses unless lumber prices for the next three years should greatly exceed those of the past three years, and this latter condition seems unlikely, in view of the most reliable forecast concerning general building prospects for the future."

On February 24, 1926, Mr. Grant, plaintiff's secretary and manager, addressed a letter to the Commissioner, confirming a conversation that he had with the Commissioner and Mr. Kinney, advising that plaintiff was unable to stand any advance in stumpage price under its contract for the next three-year period; that the company made pracically nothing on its investment during the past two years owing to low prices occasioned by general overproduction of lumber, notwithstanding that during those years there had
31 been the greatest demand ever known for lumber; and that future prospects indicated a decreased demand for lumber and lower prices. The letter also stated:

"Also we would call your attention to the fact that our timber was purchased at $3.53 per M under a contract, the intent of which, we believe, was to divide the prospective advance in timber values between the Indians and ourselves, so that our present price of $1.90 shows an advance over initial price of $1.37. This $1.37 is one-half of $2.74 which, added to our original price of $3.53, would give a value of $6.27 before any further advance would be warranted under this theory."

Mr. Grant also called attention to the fact that the remaining timber on the unit was far below the average quality, and that the company could not expect to make the sales returns which it had been averaging under as good market conditions as had existed; that his company had an investment at Algoma in its mill, railroad, and logging equipment of over $1,000,000; that in view of the great risks of the business, his company had hoped that its investment might net 12%, or $120,000 annually, or $3.00 per M on an estimated cut of 40,000,000 feet; that he believed his company was faced with the prospect of a net loss, even if stumpage prices were not raised.

On February 26, 1926, the Commissioner addressed the following telegram to the Superintendent of the Klamath Reservation:

"Advise Algoma and Lamm Lumber Companies there will be no increase in stumpage prices on April first."

On February 27, 1926, the Commissioner replied to plaintiff's letter of February 24, 1926, and advised that prior to receiving the company's letter,

"* * * final consideration had been given to the question of whether an increase of the price would be justified in view of market conditions and the terms of your contract for the purchase of this timber, and the Commissioner had instructed Superintendent Arnold of the Klamath Indian Reservation to advise your company that no increase would be made in the prices of the various species on April 1, 1926."

32 On December 7, 1926, plaintiff addressed a letter to the Superintendent of the Klamath Indian Agency, confirming a conversation with the Superintendent and Mr. Kinney, requesting permission to reduce the minimum to be cut from its reservation units during 1927 to 15,000,000 feet. This request was made for the reason that plaintiff had suffered a serious fire in one of its timber units during 1926.

On February 26, 1927, the Commissioner addressed the following wire to the Superintendent of the Klamath Indian Reservation:

"Advise Algoma Lumber Company and Lamm Lumber *ber* Company that prices of stumpage on Middle Mount Scott and Southern Mount Scott Units will not be increased April first, nineteen twenty seven."

On the same day, namely, February 26, 1927, the Commissioner addressed the following telegram to plaintiff:

"The price of stumpage on Middle Mount Scott Unit will not be increased April first, nineteen twenty seven."

On March 18, 1927, plaintiff addressed the following letter to the Commissioner:

"We are in receipt of a wire from you advising that the price of stumpage on Middle Mount Scott Unit in the Klamath Indian Reservation would not be increased April 1, 1927. We are a little puzzled by this wire, as our price was fixed a year ago for the three years next succeeding."

On March 30th, the Commissioner replied to the plaintiff's letter of October 18th, stating in the second and third paragraphs thereof as follows:

"April 1, 1926, was the regular period for the increase of stumpage prices on this unit. Because of unfavorable market conditions this Office did not think it advisable to increase the prices at that time and so advised you by letter of February 27, 1926. It was hoped at that time that there would be a substantial improvement in conditions prior to April 1, 1927. However, conditions have been such during the past year and the outlook for increased lumber prices during the year beginning April 1, 1927, is such that the Office thought it inadvisable to require any increase in price effective April 1, 1927, for the remaining two years of the three-year period.

33 "Should the market during the year 1927 be such that the Office shall feel at the close of the year that the deferred in-

crease in stumpage prices may fairly be made, you will be advised prior to February 1, 1928, unless you should kindly consent as you have heretofore done, to leave this question open for an additional month."

On April 20, 1927, plaintiff acknowledged the receipt of the Commissioner's letter of March 30, 1927, and stated that the Commissioner's letter of February 27, 1926, made no reservation that the decision would hold for one year only and that under its contract prices were to be fixed for three years at that time, and it assumed that the prices made by the Commissioner's letter of February 27, 1926, would hold for three years, and that it had planned accordingly. Plaintiff also stated in its letter that it would like the Commissioner to confirm these prices for the remaining two years of the three-year period, and stated that the Commissioner apparently did confirm these prices in the second paragraph of his letter of March 30th, but with a reservation in the third paragraph.

On April 27, 1927, the Commissioner replied to plaintiff's letter of April 20, 1927, and stated that he did not understand how the plaintiff interpreted the second paragraph of the Commissioner's letter of March 30, 1927, to mean that there would be no rise on the Middle Mount Scott Unit until April 1, 1929; that the third paragraph of that letter made it clear that there might be an increase on April 1, 1928, which would apply to only one year. He also stated therein that he felt that plaintiff had been very fairly treated in the matter of stumpage price readjustments, and that if there should be an improvement in market conditions during the present year plaintiff could not reasonably object to an increase during the last year of the then present three-year period; that the plaintiff should recognize that the Commissioner had given full consideration to the depressed market conditions that had prevailed during the preceding two years, and that the increases made at the time of the first and second readjustments were much smaller than might have been made under the terms of the contract.

On May 6, 1927, plaintiff replied to the Commissioner's letter of April 27, and said that its contract provided that an increase
34 could be made every three years if conditions warranted, and that such price should hold for the succeeding three years; that it had assumed that the price fixed by the Commissioner in 1926 would hold for the next three-year period, inasmuch as the Commissioner made no reservation at that time; that it was disappointed to note that the Commissioner wished to reserve the right to change the stumpage price on April 1, 1928; that lumber prices at the present time indicated that there would be little, if any, profit in the business for the current year.

On November 30, 1927, the Chief Supervisor of Forests addressed a letter to Mr. E. J. Grant, manager of the plaintiff, containing in its two final paragraphs the following:

"I, and all associated with me in the Forestry Branch of the Indian Service, feel very strongly that the price of $4.90 now being

paid for stumpage on the Middle Mt. Scott Unit is considerably more than $1.00 below the stumpage value of that timber as indicated by all sales made during the past six years. After a very liberal discount of the price on all recent sales, on the ground that sharp competition has advanced the price beyond the conservative market value of the same for a satisfactory profitable manufacturing process, we cannot escape the conclusion that the present stumpage price on the Middle Mt. Scott Unit is too low.

"Irrespective of the present weakness of the lumber market, I have decided definitely that I must recommend an increase in price on the said Unit effective April 1, 1928. I have not yet reached a conclusion as to the exact amount of the increase that I should recommend, in view of the present state of the market. As indicated above, all of us know that when comparison is made with all units sold on Klamath Reservation subsequent to 1923 the timber on the Middle Mt. Scott Unit should carry a stumpage charge in excess of $6.00. However, we are disposed to give the fullest consideration to the fact that said unit was sold in 1917 and to concede that the advance in price on April 1, 1928, should be conservative. Argument to the effect that no increase should be made on April 1, 1928, would be fruitless, but it is quite possible that the amount of the increase could be established by agreement, and I believe it would be entirely proper for you to suggest the increase that you feel would be fair to the Indians and not burdensome to the Algoma Lumber Company."

35 On December 31, 1927, plaintiff replied to the letter of November 30, 1927, and after referring to the unsatisfactory conditions that had prevailed in the lumber business during the past year, expressed the view that the industry was facing further depressed conditions during 1928 and probably 1929. It stated that profit on its operations during 1927 was estimated at only $35,000; that it had considerably over $1,000,000 invested in plant and equipment and that it believed that owing to the unusual fire hazards it was entitled to a profit of 12% to 15% on its investment in equipment; that certain of its competitors were about to liquidate their investment in timber holdings, and that the Indian Service also was about to offer for sale several large tracts, to prevent further beetle damage, notwithstanding the prospects of a decreased demand for lumber; that in view of such conditions, it had hoped that the Supervisor might consider a decrease in the stumpage price; that it could not see the reasonableness of an increase, and could not understand why the Supervisor should consider a price increase in a year when, apparently, under the contract there was no legal right to increase the price, because the contract provided for prices to be changed only at three-year intervals, and the next price change period would be 1929; that unless conditions changed greatly prior to the spring of 1929, it could see no reason for a change, except downward, at that time.

11. On January 17, 1928, the Chief Supervisor of Forests addressed a letter to the Commissioner of Indian Affairs respecting the readjustment of stumpage prices on April 1, 1928, on several units of the Klamath Reservation. The Supervisor advised the Commissioner that on April 1, 1926, an adjustment of price was considered only for two units, namely, the Middle Mount Scott (Algoma Lumber Company) and Southern Mount Scott (Lamm Lumber Company); that because of the declining lumber market it was not possible to raise the price on these units if only the years 1923, 1924, 1925 were considered; that because of poor market conditions prevailing early in 1926, the office advised both the Algoma Lumber Company and the Lamm Lumber Company that no rise in price would be made on April 1, 1926; that in the early part of 1927
36 market prospects had been again poor and both companies had been again advised that no increase would be made on April 1, 1927; that the stumpage prices on contracts affecting five other units were also subject to adjustment on April 1, 1927; that with respect to these units no increase had been made in 1924 because of high initial prices and unsound conditions on several of these units; that no increases having been made in 1924, and competitive bidding on other units having indicated a marked rise in stumpage prices, notice was given in March 1927 to all of those companies of an increase of $1.00 in price, but said increase was omitted for the year beginning April 1, 1927; that the Algoma Lumber Company and the Lamm Lumber Company were both advised by him, when he was at Klamath, that he felt the price on both units should be raised on April 1, 1928; that both companies protested, but that he had no hestitation in saying that a rise of $2.00 per M feet would not have made their prices comparable to the prices to be paid by several other companies after April 1, 1928; that he believed that some of the other companies had paid more than the timber was really worth and for that reason had never suggested a $2.00 increase. He further stated that he had suggested a rise of $1.00 per M feet and felt confident that the timber on both the Middle Mount Scott and Southern Mount Scott Units had a then present actual stumpage value; even on a weak market, more than $1.00 greater than the prices that were then being paid; that after giving full consideration to existing conditions he had concluded that the price on both units should be increased the same amount as the other units, namely, 56¢, effective April 1, 1928. He further suggested that in May 1926 three Klamath units sold for $7.29, $7.84, and $8.00; that these prices seemed to all timber men in the Indian Service to show that the Algoma and Lamm units were each worth at least $6.00 per M, after making allowances for the unusually sharp competition in prices received in the latter sales; that when the time came for notice of readjustment early in 1927, the lumber market was in a deplorable condition and another "year of grace" was given the Algoma and Lamm Companies. The Supervisor further stated that he felt

37 the price to the Algoma Lumber Company and the Lamm Lumber Company should be increased at least 56¢ on April 1, 1928; that while he had considered fully the claim made by these companies that the Commissioner was "estopped" from increasing the price on April 1, 1928, because of his failure to make such increase on April 1, 1926, he did not feel that the language of the contracts should be construed in that manner, inasmuch as both companies in 1920, and again in 1923, asked and urged that the strict terms of the contracts be set aside so that their interests might be given equitable consideration; that this was done, and to all practical purposes a new basis of adjustment, namely, one of reappraisal, was adopted. The Supervisor of Forests and the Superintendent of the Klamath Reservation also signed the letter as agreeing with the statements of fact and conclusions of the Chief Supervisor of Forests.

On January 20, 1928, the Commissioner addressed a letter to plaintiff in which he reviewed the facts respecting his action under the contract with respect to the readjustment of prices on April 1, 1920, and again on April 1, 1923. With respect to the first adjustment date, namely, April 1, 1920, the Commissioner stated that the stumpage price of yellow pine was increased 67¢, or from $3.57 per M feet to $4.24; that the record showed clearly that under a strict interpretation of the terms of the contract the increase in price might have been more than equal to the original purchase price; that the small increase in price that was made was fixed after careful consideration had been given to all circumstances connected with the case, including a consideration of all increased costs of production; that the justification of the increase was demonstrated by reports filed by plaintiff with the Commissioner showing that plaintiff's profits during the years 1920, 1921, and 1922 had been twice the amount ordinarily to be expected in the lumber manufacturing business; that the increase of 66¢ in the stumpage price of yellow pine made under the contract, effective April 1, 1923, was but little more than 1/6 of the net increase in the margin of profit realized generally in the Klamath District during the three years 1920, 1921, and 1922 over the average prices realized in 1917, 1918, and 1919; that the only justifi-

38 cation for such a small increase in the stumpage price increase, representing such a small fraction of the increase in margin of profit that could be consistently urged by the plaintiff or that could be conceded by the Service, was on the theory that the increased prices received during 1920, 1921, and 1922 could not be obtained during the succeeding three years, and that such increased prices had not been accompanied by a corresponding increase in stumpage values. In his letter the Commissioner also stated:

"At that time, as well as at the earlier adjustment, you urged that the provisions of the contract of purchase be not strictly enforced but that sympathetic consideration be given to the probabilities of greatly reduced prices in the future and that the indicated rise in stumpage be strongly discounted. It was in a spirit of cooperative

fairness and a desire not to impose any burdensome stumpage prices upon your company that the small increase of 66¢ per M feet was established, making your new price only $4.90 whereas other units of unquestionably lesser value had already been sold in the competitive market for more than $5.00."

The Commissioner further stated that subsequent sales in 1924, of less desirable units for $4.78, $5.53, $5.72, and $6.67, indicated that the Service had not realized how much stumpage values had risen, and also, that the prices for manufactured products obtained by plaintiff during the years 1923, 1924, and 1925, demonstrated that plaintiff's predictions and the estimates made by the Service early in 1923, as to the future, had not been sound; that it was the general opinion of all Forestry representatives of the Service familiar with the Klamath situation, that the stumpage price under plaintiff's contract should be increased on April 1, 1926; that market prospects for 1926 had been so unsatisfactory that the office advised plaintiff that no increase would be made on April 1, 1926; that similar market conditions prevailing early in 1927, resulted in a similar decision not to consider an increase on April 1, 1927; that on April 1, 1928, automatic increases became effective on several Klamath units, and increases imposed on other units on April 1, 1927, also became effective; that on most of these units the price of yellow pine, subsequent to March 31, 1928, would be above $6.00 per M feet, and on
39 five units, none of which had an operative value equal to plaintiff's unit, the price would be above $7.25 per M feet; that under the circumstances there was a very positive feeling in the Service that a large increase on plaintiff's unit was fully justified. The Commissioner further stated:

"However, I am informed as to your contention that an increase on April 1, 1928, cannot legally be enforced. While I believe you wholly unjustified in raising this technicality, in view of the equitable treatment that has heretofore been accorded your company, I am quite ready to admit that the imposition of an increase without your consent would be open to criticism as an arbitrary exercise of discretion and might even be subject to attack on the ground of illegality.

"Under such circumstances I wish to inquire whether you will not voluntarily agree to an increase of 56¢ per M feet in the price of yellow pine cut from the Middle Mount Scott Unit during the year beginning April 1, 1928? I assure you that it is the opinion of all forestry men in the Indian Service who are familiar with the Klamath situation that an increase of $1.12 on this unit, making the price $6.02, would not equal its value as compared with other units now being operated, but in view of the existing doubt as to the authority of this office to increase the price at its discretion, I would consider a compromise agreement on a raise of 56¢, making your price for the coming year $5.45 per M as a satisfactory adjustment.

"I recognize fully your duty to safeguard the interests of your company. I hope you will recognize my duty of protecting the interests

of the Klamath Indians and I trust that you will not overlook the consideration which this Service has heretofore given your company in construing the terms of the contract equitably rather than strictly."

On January 30, 1928, the Commissioner addressed the following telegram to the plaintiff:

"Please wire today whether you accept suggested compromise of fifty six cents increased price Klamath timber."

On January 30, 1928, plaintiff addressed the following telegram to the Commissioner:

"Yours thirtieth our loss last year on Middle Mount Scott operations was five thousand exclusive of any interest on our own or borrowed capital stop We would like to have time to present these reports and also have you give consideration to reports of other operators to determine if our operation is inefficient stop Market conditions are more unfavorable now than a year ago we wish to waive for this year any right we might have to insist upon a price determination by February first and extend time to April first."

On January 30, 1928, plaintiff replied, by letter, to the Commissioner's letter of January 20, and stated, in substance, that it did not wish to take an arbitrary stand in the matter, and hoped the Commissioner would examine into the question of plaintiff's profit for the past year, and also compare its efficiency with other operators in the District. In its letter plaintiff stated, among other things:

"We went into the Middle Mount Scott Unit as the first large sale which was made of Klamath Indian Reservation timber, and in effect, the contract reads that the advance in the price of lumber, taking into account changes in operation cost, is to be divided between the Indians and ourselves. At our present stumpage price you are now giving the Indian Reservation $1.37 above the bid price on every thousand feet of timber which we cut. This presupposes that the present market and labor conditions will return to us an increased profit of $1.37 over market and labor conditions such as existed in 1917, the year in which we purchased this Unit. Instead of this, we maintain that our profit has been entirely cut out by the advances already made, and we think it an injustice that you should consider further advances until conditions have considerably improved. The fact that there has developed during the past few years a temporary shortage of timber in the Klamath section, and that some mills have bid very exorbitant prices for it, and are no doubt protesting against our low prices, should not be a factor in penalizing us. There is certainly nothing in our contract which suggests any equalizing of our stumpage prices with any which others may be paying or bidding. We are of the opinion that all of the operators paying $6.00 per thousand or over for stumpage in the Klamath Indian Reservation will be in the hands of their creditors within a very few years, as the price is a false and artificial one which seemed warranted by conditions of several years ago, but is certainly not warrranted by the conditions of to-day."

41 Plaintiff acknowledged that it had made a very good profit some of the past years, under the contract, but stated that this profit had largely been put back into plant improvements at Algoma to reduce costs; the letter also referred to plaintiff's Antelope timber purchase; it stated that on top of these plant expenditures, the company had suffered losses on account of two forest fires, and also the burning of its Montague Plant. In its letter plaintiff said:

"We make mention of these facts to show the risks involved in the lumber business and to further show that we are not in a position to pay the Indians a price for their timber beyond that at which we are able to make a profit."

On March 14, 1928, plaintiff addressed a letter to the Commissioner, referring to its telegram and letter of January 30, and stated that it would like to extend to May 1 the time for determining the price readjustment; that the lumber business was in very bad shape, and until conditions improved it could not pay a higher price and conduct its business at a profit; and that such a condition would be extremely unfair to it.

On March 23, 1928, the Commissioner advised plaintiff, by letter, that it was expected that final determination as to the price adjustment on the Middle Mount Scott Unit would be reached before April 1, 1928; that since the contracts provided for all changes in prices on April 1, it did not appear advisable to delay the decision until May 1, as suggested.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

"Decision reached increase price Middle Mount Scott Unit Forty Cents effective April first period. Hope you will recognize entire fairness this increase."

On March 26, 1928, plaintiff replied to the Commissioner's telegram of March 24, and stated that it felt that the rise was unwarranted and unfair at that time, under the rights given to it by its contract. In the final paragraph of its letter plaintiff asked:

"If we decided to accept this increase without further com-
42 plaint, may we have your assurance that no increase in price will be made on our unit next season, and that consideration will be given to a reduction in price in case we make no profit this year with operating efficiency as good as the average in the Klamath Falls District?"

On April 4, 1928, the Commissioner replied to plaintiff's letter of March 26, 1928, and stated that he would hesitate to even suggest that plaintiff's operation was inefficient, as compared with other operators in the Klamath Region, but that a reply to plaintiff's inquiry necessitated the observation that the profit shown on financial and operating statements submitted by the Algoma Lumber Company had generally been substantially below that shown by other companies operating in the Klamath Basin, and that this was true also of reports for the year 1927; that in view of the fact that the oper-

'ating value of the Middle Mount Scott Unit had universally been considered as among the three or four highest units on the Klamath Reservation, while the stumpage price thereon ranked as one of the four lowest, the office was forced to conclude that either the efficiency of plaintiff's organization was somewhat less than that of those showing better results, or that plaintiff's system of accounting was such that it did not show results to be as favorable as they actually were. The Commissioner advised plaintiff that he could not at that time assure it definitely that there would be no increase on April 1, 1929, but that should the major part of plaintiff's logging operations be conducted on the Middle Mount Scott Unit during 1928, and yet with average operating efficiency plaintiff should realize no profit, the office would not decline to consider an application for a reduction in price, but that in view of all the circumstances it did not appear probable that any reduction could be made on April 1, 1929. The Commissioner also said that the increase in price, effective April 1, 1928, was considered in the light of an adjustment of stumpage value to date,

"* * * and while the office feels that the new price of $5.30 does not represent the full value of the Middle Mount Scott stumpage on a competitive market basis, it concedes that this new price partakes of the nature of a compromise as to the increase that
43 may be imposed on the basis of market prices to the end of the year 1925, and any increase that may be imposed on April 1, 1929, will be based upon the market during 1926, 1927, and 1928, as compared with that for 1923, 1924, and 1925."

12. On April 4, 1928, plaintiff addressed a telegram to Senator Frederick Steiwer, requesting that its name be added to the list of Klamath operators affected by the increase of 40¢ in the stumpage price being made by the Indian Bureau; that it considered the increase very unfair and hoped that a reconsideration of the matter might be obtained.

On April 7 the Commissioner replied to the Senator's letter of April 5, and advised that he had carefully considered the Senator's presentation of a telegram from the Algoma Lumber Company with respect to the 40¢ increase in stumpage price effective April 1, 1928, and that

"A careful review of this case convinces me that the action that was taken was proper under the circumstances and I do not feel that I would be justified in the cancellation of the increases."

On April 18, 1928, the plaintiff replied to the Commissioner's letter of April 4, 1928, and reiterated its belief that the advance in stumpage price recently made was both unfair and not legally justified under the rights given to the Commissioner by the Middle Mount Scott contract. The plaintiff inquired whether the Commissioner would be antagonized by a friendly suit at law to determine the legality of his action in making the advance. The final paragraph of the plaintiff's letter was as follows:

"We note that no bids at all were received on the last two units offered by the Klamath Indian Reservation although prices were

around $5.00 per M feet, and many mills in this district are desperately in need of additional stumpage. Is this not sufficient proof to you that the lumber business is not in the prosperous condition which you seem to assume?"

On May 2, 1928, the Commissioner replied to plaintiff's letter of April 18, 1928, and assured plaintiff that any appeal it might wish to pursue in regard to the reappraisement of the Middle Mount
44 Scott Unit stumpage would not prejudice the friendly relations now existing between his office and plaintiff company. The Commissioner further stated, in reply to an inquiry made by plaintiff in its letter, that he could see no connection between the stumpage price readjustment of the Middle Mount Scott Unit, and the lack of bids on two badly insect-infested units located on the east boundary of the Klamath, requiring very large developing expenditures; and called the plaintiff's attention to the fact that the proposed contract for those two units required the cutting and removal of 25,000,000 feet of timber prior to March 31, 1929, and that the purpose of that provision, and the decision to offer the units in the first place was to effect, if possible, beetle control on the Klamath.

On September 29, 1928, plaintiff addressed a letter to the Commissioner protesting the 40¢ increase in the stumpage price under its Middle Mount Scott Unit contract, effective April 1, 1928, and served notice that the cash advances paid by it to the Superintendent of the Klamath Reservation, under the terms of its contract, should not be applied at a rate greater than $4.90 per thousand feet for yellow pine, sugar pine, and incense cedar; that said protest was a continuing one, and if payments were made, except as directed in its notice, plaintiff would seek to recover from the Government the amount of the excess so paid.

On October 8, 1928, the Commissioner referred plaintiff's letter of protest to the Chief Supervisor of Forests, and the Forest Valuation Engineer, for report and recommendation. On October 29, 1928, these persons advised the Commissioner, by letter, that in their judgment the increase of 40¢ per thousand was very conservative; that the Unit was a very desirable one, having a cut per acre of 20,000 feet B. M., as compared with 15,000 feet B. M. for the average area on the Reservation; that the increased price paid by plaintiff was one of the lowest in effect in that competitive field; that the action taken was supported by the favorable trend of the market since April 1, 1928; and recommended that no further action be taken in the matter in view of the very favorable consideration given to plaintiff in connection with the revaluation made effective April 1, 1928.

On November 9, 1928, the Commissioner acknowledged the
45 receipt of plaintiff's letter of September 29, 1928, protesting the 40¢ price increase made effective April 1, 1928, and advised that he had given careful consideration to the matter presented, and was still of the opinion that the increase in price of 40¢ per M on the Middle Mount Scott Unit, effective April 1, 1928, was fully justified.

13. In the Klamath District, the income from the industry as a whole, that is, of those corporations operating on the Klamath Indian Reservation, was for the period 1923 to 1929, inclusive, as follows:

Year:	Net Income
1923	$345,452.89
1924	292,574.55
1925	648,519.12
1926	501,019.90
1927	37,798.03
1928	461,566.42
1929	118,552.67

This income reflected a return on the investment (net worth) of the following:

	Percentage
1923	9.7
1924	5.4
1925	10.8
1926	5.0
1927	0.36
1928	3.9
1929	1.3

14. The fourth price adjustment period under the contract commenced on April 1, 1929.

On January 21, 1929, the Commissioner, by letter, requested plaintiff to consent to the receipt of notice relating to the price adjustment under the contract any time prior to April 1, 1929. The letter stated that this request was made because of the delay on the part of the plaintiff and other companies in furnishing information as to sales and costs in sufficient time to enable the Commissioner to determine what price adjustment, if any, should be made under the contract.

The Commissioner in his letter advised plaintiff that his information indicated that the prices to be paid after March 31, 1929, should be the same as then prevailing under the contract, namely, $5.30
46 per thousand feet for yellow and sugar pine, and the same prices then being paid for other species, but that if cost and sales data to be obtained from the various Klamath operators should indicate that higher prices should be fixed for any of the species, plaintiff would be afforded an opportunity to show why no such price increase should be made effective. Plaintiff, on January 30, 1929, advised the Commissioner that it consented to the receipt of the required notice for April 1, 1929.

On February 12, 1929, the Superintendent of the Klamath Reservation advised the Commissioner that he had received financial statements from the Forest Lumber Company, Chiloquin Lumber Company, Ewauna Box Company, Campbell-Towle Lumber Company, Big Lakes Lumber Company, and Shaw-Bertram Lumber Company, but that he had not received a similar report from the plaintiff; that the plaintiff had recently advised that its financial statement would not be ready to submit prior to April 1.

On February 14, 1929, the Forest Valuation Engineer of the Indian Service advised the Commissioner, by letter, that the Algoma

Lumber Company had not submitted a financial statement, and had advised that such report, by reason of the non-closing of its books until February 28, 1929, would not be available until about April 1; that in these circumstances he would not be able to submit his report until the last of March or early in April.

On May 4, 1929, the Commissioner advised plaintiff, by letter, that the submission of the Forest Valuation Engineer's report had been greatly delayed because of plaintiff's inability to furnish a financial statement with respect to its operations for the year 1928; that in view of the data obtained from the various companies, and from other sources, as to cost and sales prices during the calendar year 1928, he had concluded that the prices for stumpage cut from the Middle Mount Scott Unit during the year beginning April 1, 1929, should remain the same as those paid during the year beginning April 1, 1928.

On May 15, 1929, plaintiff replied to the Commissioner's letter of May 4, and protested against the stumpage price increase effective April 1, 1929. The protest was based on the same facts which
47 it relied upon to support its protest made in 1928, and the further fact that conditions warranted no increase in stumpage price starting in 1929.

On June 19, 1929, plaintiff addressed a letter to the Commissioner, referring to its previous letter of September 29, 1928, wherein it protested against the increase of 40¢ per M feet for pine on the Middle Mount Scott Unit, and also to its letter of May 15, 1929, protesting against the increase in price effective April 1, 1929. Plaintiff protested that no part of the deposits made by it should be applied to the payment for stumpage at a rate greater than $4.90 per thousand feet for yellow and sugar pine, and incense cedar. The Commissioner was advised that if any payments were made in excess of that sum plaintiff would take such action as necessary to recover from the Government the excess amount so paid.

On August 23, 1929, the Commissioner advised the Superintendent of the Klamath Reservation that plaintiff had protested the payment of 40¢ advance in price of yellow pine and sugar pine, effective April 1, 1928, on the Middle Mount Scott Unit, and that pending the final disposition of plaintiff's appeal a sufficient amount should be retained in all individual Indian accounts to cover a refund of 40¢ per M feet on all timber cut from particular allotments and paid for at the advance price, effective April 1, 1928.

On March 22, 1930, plaintiff requested the Commissioner to consent to the reduction of the minimum quantity of timber required to be cut by plaintiff under its contract. On March 27, 1930, the Commissioner wired plaintiff that the cut made by it on the Middle Mount Scott Unit during the preceding logging season would be accepted as a compliance with the contract cutting requirements on the Middle Mount Scott and Antelope Valley Units.

On December 3, 1930, plaintiff forwarded to the Superintendent of the Klamath Reservation duplicate invoices for $25,094.56, the

amount allegedly overcharged on timber cut by plaintiff during 1928, 1929, and 1930, under its Middle Mount Scott Unit contract. The letter contained the following paragraph:

"We have not yet started suit in the Court of Claims for
48 recovery of this amount, as we have it in mind to await the result of the suits now pending by the Lamm Lumber Company and the Forest Lumber Company, whose claims against you are based upon much the same grounds as our own. During a recent trip to Washington I talked with Mr. Kinney about this matter, and he told me that he saw no reason why our claim could not be allowed without a suit, providing precedents favorable to us were established by the decisions in these other cases."

On December 28, 1931, the Supervisor of Forests, Klamath Agency, Oregon, certified that the plaintiff had satisfactorily completed operations under its Middle Mount Scott Unit contract.

Scaling began November 5, 1917, and was completed April 30, 1930. The total footage of timber of all species cut by plaintiff under its contract on tribal and allotted lands was 316,879,370 feet, valued at $1,460,950.95. The total quantity of yellow pine cut by plaintiff from tribal land under its contract was 240,781,900 feet board measure, valued at $1,157,040.73. It cut 72,354,080 feet board measure of yellow pine, valued at $300,642.35 from individual Indian allotments; or a combined total quantity of yellow pine cut from tribal and allotted lands of 313,135,980 feet board measure, valued at $1,457,683.08. The value of all species of timber other than yellow and sugar pine cut from tribal land and also allotments was $3,267.87, or a total value of $1,460,950.95.

For the first three-year period under the contract ending March 31, 1920, plaintiff paid for yellow and sugar pine a stumpage price of $3.57 per M feet B. M.; for the second three-year period ending March 31, 1923, plaintiff paid $4.24; and for the third three-year period ending March 31, 1926, plaintiff paid $4.90. Beginning April 1, 1928 (the third year of the fourth three-year period, which began April 1, 1926), plaintiff paid $5.30; for the fifth period beginning April 1, 1929, plaintiff paid $5.30 per M feet B. M. The average stumpage price paid by plaintiff for yellow and sugar pine under the contract was 4.5025 per M feet B. M.

15. From April 1, 1928, to March 31, 1929, plaintiff cut 26,019,330 feet board measure of yellow and sugar pine, as shown by the
49 records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase made effective on April 1, 1928, totals $10,407.73.

16. From April 1, 1929, to March 31, 1930, plaintiff cut a total of 31,633,190 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase effective April 1, 1929, totals $12,653.28.

During the contract period beginning April 1, 1930, and ending March 31, 1931, plaintiff cut a total of 5,083,870 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Reservation. That quantity of timber multiplied by 40¢ per M feet board measure, the amount of the challenged price increase paid during the period beginning April 1, 1930, totals $2,033.55.

17. The total quantity of yellow and sugar pine cut by the plaintiff during each of the yearly contract periods beginning with April 1, 1928, and ending with March 31, 1931, totaled 62,736,390 feet board measure. That quantity of timber multiplied by 40¢ per M feet, the amount of the challenged price increase made effective under the contract April 1, 1928, and which continued in effect during the remainder of the contract period, totaled $25,094.56.

18. During the 14 years prior to 1931, the Indian Service made an investigation and study of the comparative production costs and selling price trends of timber within the Klamath Region for the purpose of establishing a sound basis to guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

The area specified in the contract of July 28, 1917, as "the Southern Oregon and Northern California region" had always been understood by lumbermen and engineers familiar with the locality as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry and is composed primarily of Klamath County, Oregon, and also small parts of Lake County, Oregon, and Modoc County, California. Topographically this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin; and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place, and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data was abstracted from the certified operating statements of the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation, and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract, he assigned an expert timber valuation engineer to make a special study of production costs

and sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports were comprehensive and considered all factors affecting the trend of production costs and selling prices of timber within the area specified in the contract.

51 Plaintiff and other timber producing companies operating within the Klamath Region were members of the California White and Sugar Pine Manufacturers Association. It was the practice of the plaintiff and other members to furnish to the association statistics respecting operations, volume production, grades, and prices received for each individual order which was shipped. This association published annually statistical statements containing an analysis of lumber prices of pine and other species of timber grown within the area defined in the contract. These statements showed summaries of inventories, orders, stocks, and comparative data on production at member mills in Oregon and California. A synopsis of the grade prices of California white pine, as shown by these statements, was incorporated in the valuation studies conducted by the Indian Service for the purpose of determining the readjustment of stumpage prices under contracts affecting the Klamath Indian Reservation in Oregon.

These statistical statements were compiled for the purpose of furnishing contributing members with information respecting the prices of upper grades of lumber. Prices which covered the lower grades, namely, box and common, and which constituted more than 65% of the log, were not reported.

19. The record in this case shows that about 60% of the timber cut by plaintiff, under the contract in suit, was made by it into box shook, and that the annual statistical statements published by the California White and Sugar Pine Manufacturers Association did not show the prices received by plaintiff for the box shook manufactured by it. Because of the omission of these data, the average mill run wholesale net value of lumber f. o. b. mills, as defined in the contract, could not be determined from the annual statistical statement published by the California White and Sugar Pine Manufacturers Association. The information contained in these statements was used only for comparative purposes by the Commissioner of Indian Affairs in determining the stumpage price adjustments under the contract, and never formed the basis of determination in connection with stumpage price readjustments, because of the inapplicability of the data contained therein to the procedure specified in the contracts.

52 In determining the regional average figures covering both production costs and sales prices, the valuation engineer followed a method intended to secure directness and mathematical simplicity. He computed the net return from sales after all adjustments for commissions, freight, etc., had been divided by gross volume sold to show average price; and the total volume sold, divided by total costs of sales, to show average unit cost. The final yearly audits of the various corporate purchasers of timber operating within the Klamath Region, as certified by their respective accountants, were totaled and direct averages obtained. The Valuation Engineer, representing the Indian Service, was thus enabled to establish for each year the average mill run wholesale net value of lumber at mills in the Klamath Region in Southern Oregon and Northern California, as defined in the contract.

The Klamath Region is noted for its fine quality of pinus ponderosa (a species of Western yellow pine). Because of its fine texture and adaptability for various commercial uses, lumber produced from that species of pine, for many years prior to 1931, entered Eastern markets under the descriptive classification of California white pine, in competition with the celebrated Northern or true white pine. There was sharp competition between rival lumber companies operating within the Klamath Region for the stumpage on the Klamath Reservation.

The highly competitive stumpage market that developed within the Klamath Region during the period of this contract was unprecedented and not foreseen by persons conversant with the trend of lumber prices. This highly competitive situation was aggravated by the post-War boom, which caused the values of stumpage to advance more rapidly than in any other known comparable area.

In the determination of the production costs of timber the cost of stumpage is one of the most important single factors to be considered.

The statistical studies and reports made by the Valuation Engineer show that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of $17.49 in 1917 to a high of $42.44 in 1920.

53 Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to $24.73 in 1927, rising again to $25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of $15.33 per M feet in 1917, to a high of $30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being $28.01 per M feet, and gradually declined thereafter to $23.38 in 1928, again rising to $25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of $3.25 to a high of $8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The

graph, evidencing the trend of stumpage prices within this competitive area, reflects only a comparatively slight increase in prices during and immediately following the years of highest sales prices for lumber, namely, 1919 to 1923, with frequent recessions in the stumpage price trend during that period. In 1917 the average sale price of stumpage within the competitive area was $3.44; whereas in 1927, the average sale price of stumpage within the Klamath Region was $7.64 per M feet.

The statistical studies and reports made by the valuation engineer show that during the contract period the average millrun net wholesale value of pine lumber within the Klamath District fluctuated as follows:

Year:	*Average Millrun Net Wholesale Value of Pine Lumber Per M.*
1917	$17.49
1918	22.96
1919	27.46
1920	42.44
1921	28.50
1922	31.71
1923	30.37
1924	27.51
1925	27.48
1926	26.36
1927	24.73
1928	24.75
1929	25.50

54 Production costs for said years within the same area as shown by said statistical studies and reports were as follows:

Year:	*Production Cost Per M.*
1917	$15.33
1918	21.52
1919	25.43
1920	30.70
1921	27.79
1922	27.59
1923	28.01
1924	25.59
1925	24.62
1926	24.37
1927	24.45
1928	23.36
1929	25.07

20. The limitation imposed by the contract on the discretionary authority of the Commissioner, with respect to fixing the stumpage rates to be paid during each of the three-year periods specified therein, was the proviso that such advance in stumpage rates, as determined at the close of each specified period,

"shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed."

At the time of imposing the stumpage price increases, effective April 1, 1920, and April 1, 1923, for the first and second price readjustment periods specified in the contract, it was understood by

plaintiff and other purchasers that the Commissioner of Indian Affairs would reconsider his action, and reduce such price increases during any year following the year that the price increase was made should market conditions warrant such action. The contract contained no provision for a reconsideration by the Commissioner of the stumpage price within any three-year period.

On April 1, 1926 (the third price adjustment period prescribed in the contract), plaintiff was advised, by telegram from the Commissioner, that the price would not be increased on that date.
55 That year the lumber market was seriously depressed, and the Commissioner, responsive to the urgent appeals made by plaintiff and other timber purchasers, deferred putting into effect a price increase during that year. Officials of the Indian Service had considered putting into effect a price increase on April 1, 1926, but the Commissioner did not believe it would be fair to impose such a price increase, because of the uncertainty of the future market.

The depression that affected the lumber market in 1926 continued into the year 1927, and prior to April 1 of that year the Commissioner notified the plaintiff that no increase in price would be made effective April 1, 1927. This action was taken by the Commissioner because of the general weakness of the then existing lumber market.

The matter of increasing the stumpage price, effective April 1, 1928, was the subject of considerable correspondence between the plaintiff and the Commissioner, subsequent to April 1, 1927, and early in 1928. The plaintiff at that time protested that the contemplated action of the Commissioner was contrary to the terms of the contract, and that present and prospective market conditions were not favorable.

Plaintiff originally bid a price of $3.57 per M feet board measure for yellow pine. That price continued in effect until March 31, 1920. On April 1, 1920, the stumpage price was increased by 67¢, making the price for the following three years ending March 31, 1923, $4.24. On April 1, 1923, the price was further increased by 66¢, making the new price $4.90, effective for the following three-year period, ending March 31, 1926. That price remained in effect until April 1, 1928, when it was increased by 40¢, making the stumpage price for the last year of the third three-year period $5.30. On January 21, 1929, the plaintiff was advised by the Commissioner that information before his office indicated that the price of yellow and sugar pine, subsequent to March 31, 1929, should be $5.30 per thousand feet, and the same prices for other species then being paid. On May 4, 1929, the Commissioner advised plaintiff that he had concluded that stumpage prices to be paid under the contract for
56 the year beginning April 1, 1929, should be the same as the prices paid during the year beginning April 1, 1928.

In determining the action to be taken in imposing the price increase of 40¢ on April 1, 1928, and again on April 1, 1929, the Commissioner was guided by many factors, and not by any one particular

factor. Consideration was given to the fact that there had been a large increase in stumpage values on the Klamath Reservation and adjacent areas. There had been a reduction in manufacturing costs. Price increases in 1920 and 1923 (the first and second price adjustment periods) were only fractional parts of the price increases that might have been imposed in those years. That action was taken because the plaintiff and other purchasers pleaded that they could not afford to pay higher prices, and the Commissioner tried to be fair with the lumber companies, and at the same time protect the interests of the Klamath Indians. Moreover, it was understood by the plaintiff and the Commissioner that in 1921 and 1922 the price increase made effective April 1, 1920, would be reduced if market conditions warranted such action. Again in 1923 the plaintiff requested, and the Commissioner agreed, that he would reduce the stumpage price increase in 1924 or in 1925, should market conditions in either of those years warrant such action. There had been a decrease in the average mill run net wholesale prices of lumber within the area defined in the contract, at the pertinent time.

21. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the Act of June 25, 1910, Sections 7 and 8 (36 Stat. 855, 857). Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed in detail the procedure to be followed in the sale of timber, and the disposition of the proceeds thereof. The declared purpose of the regulations was "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." The department of the Government engaged in the administration of Indian Affairs has always treated the Indian Forests as private property, held in sacred trust by the United States, for the Indians.

On some reservations the merchantable stand of timber was
57 practically the only source of revenue from which the cost of social and industrial betterments for the Indian Tribe could be met by the Indian Service.

The form of contract of July 28, 1917, except for minor modifications, providing particularly for a fixed increase in the price of stumpage every three years, has been used in every sale of timber on Indian reservations since the passage of the act of June 25, 1910.

In 1923 a form of contract was adopted for the sale of Indian timber, providing for fixed stumpage price increases every three years. Under that form of contract the price to be paid for the first contract period was stipulated. For each of the remaining three-year periods it was stipulated that the purchaser of the timber would pay the prices paid during the preceding three-year period, plus 12% thereof. The modified form of contract also contained a provision authorizing the Commissioner to relieve the purchaser from all or any part of the increase in price under the original contract stumpage price should the Commissioner be satisfied, after investigation, that notwithstanding efficient operations, the purchaser was unable to make a profit under the then existing market conditions. The contract also

contained a proviso that the reduction should never be less than the stumpage price specified during the first period of the contract. The Commissioner also reserved the right to reimpose any part, or all the increases at any time, upon giving notice to the purchaser, subject to review by the Secretary of the Interior. Except as indicated above, the modified form of contract adopted in 1923 was substantially the same in form as the contract approved by the Secretary of the Interior and used in connection with the sale of timber on Indian reservations under the 1910 Act.

Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were substantially similar in form to the contract of July 28, 1917, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the sale of timber on Indian reservations under the act of June 25, 1910,
58 was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold, the practice followed in all cases was for the Superintendent of the Indian Reservation to advertise definite units of timber for sale; accept bids and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made.

The contract was then prepared on the form prescribed by the regulations, and signed by the Superintendent on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract of purchase.

Article 2 of the Tribal Timber Contract of July 28, 1917, authorized the purchaser of tribal timber to make separate contracts with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell the timber thereon. Plaintiff entered into contracts with 21 Indian allottees holding allotments within the sale area designated in the tribal contract, namely, Middle Mount Scott Unit.

These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract; that is, contracts for sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior, but plaintiff made all contracts for the purchase of timber on allotments held by individual Indians with the holders of such allotments.

Collections of the stumpage prices paid under these allotment contracts were made by the Superintendent of the Reservation, under the tribal contract; that is, in the administration of the contracts for the purchase of timber within the Klamath Reservation, growing upon either unallotted or allotted lands, the collections were made as if only one contract was involved.

No contracts for the sale of Indian tribal timber have been
59 made in the form and manner prescribed by R. S. 2103. Contracts for the sale of Indian tribal timber have always been made substantially in accordance with the form of contract involved in this suit.

Contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber, and by the administrative department concerned, to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior, and specifically the Commissioner of Indian Affairs, for the sole benefit of either the tribal or individual Indians concerned.

22. The purchaser, as required by the terms of the tribal timber contract of July 28, 1917, and the several contracts made by it with individual Indian holding allotments within the sale area designated as the Middle Mount Scott Unit, paid to the Superintendent of the Klamath Indian School the sum of $1,460,950.95. Of this sum, $1,159,494.52 represented payment for various species of timber cut from tribal lands. The remaining $301,456.43 represented payments for various species of timber cut from allotments held by individual Indians.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provides in substance that the proceeds of sales of timber on any Indian reservation, except those of the Five Civilized Tribes, shall be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of such tribes and under such regulations as the Secretary of the Interior shall prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the respective tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed thereafter with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

The act of March 2, 1907 (34 Stat. 1221), authorized the Sec-
60 retary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which such Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any Indian Agent, Superintendent, etc., to deposit Indian money, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury tribal funds susceptible of segregation, so as to credit an equal share to each member of the tribe and to deposit the funds in private banks, subject to withdrawal for payment to the individual owners, or expenditure for their benefit.

Prior to the act of February 12, 1929 (45 Stat. 1164), as amended by the act of June 13, 1930 (46 Stat. 584), tribal funds deposited in the Treasury of the United States to the credit of such Indians did not bear interest. Following the passage of that Act, tribal Indian funds on deposit in the Treasury of the United States to the credit of the respective Indian tribes bore simple interest at the rate of 4%.

The act of July 1, 1898 (30 Stat. 595), required United States Indian Agents to account for all funds coming into their lands, as custodians, from any source, and to be responsible therefor under their official bonds.

23. All the proceeds on account of purchase of timber on the Middle Mount Scott Unit, Klamath Indian Reservation, paid by the plaintiff to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of July 28, 1917, and the several allotment contracts made with individual Indian owners, as authorized by Article 2 of that contract, less the sum of 8%
61 thereof, were deposited by the Superintendent, either in private state banks or in the Treasury of the United States, to the credit of the tribal, or individual, Indians concerned.

The tribal timber contract of July 28, 1917, and the several contracts made by the plaintiff with the holders of allotments, were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. The proceeds from the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians." No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States. All the net proceeds of the sale of such timber was deposited by the Superintendent to the credit of the respective tribal, or individual, Indians concerned.

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with Paragraph 21 of the amended Regulations, approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920 (41 Stat. 415), which authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for

the work incidental to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales of such timber. This 8% was deducted by the Superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses of administering the contracts of sale and the Indian forests. It was deposited in the Treasury to the credit of the United States, under the caption "Miscellaneous Receipts."

With respect to the method of accounting for the proceeds of sales of timber under the contracts, the practice followed by the Office of Indian Affairs was for the purchaser to pay to the Superintendent the advance payments, as stipulated in Article 4 of the contract.

Upon receipt of the proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon the books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Indians and also the
62 respective sums of money payable to the individual Indian allottees concerned. This action was based upon scale reports made by Civil Service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or Disbursing Officer of the Indian Agency who held such moneys in trust for the respective Indian allottees. The banks selected as depositaries for individual Indian moneys keep no record of the individual Indian accounts; that is, trust funds were subject to withdrawal by the Superintendent of the reservation and were distributed by him to the individual owners thereof under regulations prescribed by the Commissioner of Indian Affairs, and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

24. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion, subject to the following proviso:

"* * * that hereafter no money shall be expended from Indian Tribal funds without specific appropriation by Congress, except as follows: equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are continued in full force and effect."

During the period from 1922 to 1934, both inclusive, per capita payments in excess of $6,200,000 had been made direct to the Klamath Indians, on account of the proceeds paid under tribal contracts for the sale of timber on that reservation. Competent Indians were paid their shares of the per capita payments directly. The per capita shares of other Indians were deposited in their accounts and expenditure thereof was subject to departmental regulations.

The proceeds of sale from Klamath Indian timber have always been treated by the administrative department concerned as

63 moneys belonging to the Klamath Indians, either tribal or individual, and not as public funds belonging to the United States.

Prior to 1927, it was the practice for the Superintendent of the Klamath Indian Reservation to submit an account of all the Indian moneys in his possession to the office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of Superintendents concerning Indian moneys in their possessions.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover $25,094.56.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand ninety-four dollars and fifty-six cents ($25,094.56).

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

The plaintiff seeks in this suit to recover the sum of $25,094.56, alleged to have been illegally collected from plaintiff as a part of the purchase price of certain Indian timber sold to plaintiff by the defendant. The controversy arises out of an increase in the price of yellow and sugar pine made by the Commissioner of Indian Affairs for the period beginning April 1, 1928, and ending March 31, 1931.

The facts disclosed are in all essential respects similar to the facts in the case of the Forest Lumber Company, No. L-391, this day decided. The questions of law presented are precisely the same. Our decision in the Forest Lumber Company case therefore controls the decision in this case and an extended opinion would be but a reiteration of what has already been said in that case, and is not deemed necessary.

64 Therefore, on the authority of the Forest Lumber Company case, the plaintiff is entitled to recover and is hereby awarded judgment in the sum of $25,094.56. It is so ordered.

WHALEY, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

65 V. *Judgment*

At a Court of Claims held at the City of Washington on the 12th day of January, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand ninety-four dollars and fifty-six cents ($25,094.56).

VI. *Proceedings after entry of judgment*

On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial.

On March 12, 1938, said motion was allowed by the court.

On April 13, 1938, the defendant filed its motion for a new trial.

On May 2, 1938, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of May 1938, that the defendant's motion for new trial be and the same is overruled.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1939

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 246

THE UNITED STATES, PETITIONER

vs.

FORREST LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 2, 1938
CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 246

THE UNITED STATES, PETITIONER

vs.

FOREST LUMBER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

1 In the Court of Claims

No. L-391

FOREST LUMBER COMPANY, A CORPORATION, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed September 20, 1930

TO THE HONORABLE CHIEF JUSTICE AND THE JUDGES OF THE COURT OF CLAIMS:

The plaintiff, Forest Lumber Company, respectfully represents:

1. That the plaintiff is, and at the times hereafter referred to was, a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business in Kansas City, Missouri.

2. That on October 30, 1920, defendant, acting through the superintendent of the Klamath Indian School, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 866), entered into a contract with Williamson River Logging Company, a corporation of
2 Chiloquin, Oregon, for the sale to said Williamson River Logging Company of all of the merchantable timber on a certain tract of land containing about sixty-seven thousand (67,000) acres, known as the Calimus Marsh Logging Unit and being a part of the Indian Reservation near Klamath Falls, Oregon, a copy of said contract market "Exhibit A" being hereto attached and made a part hereof.

3. That on August 10th, 1926, plaintiff purchased this contract from Modoc Pine Company (which on March 19th, 1925, had purchased it from Williamson River Logging Company) and has been ever since then and is now the owner of same, said contract having been assigned to Modoc Pine Company by Williamson River Logging Company and to plaintiff by Modoc Pine Company by instruments bearing, respectively, the dates aforesaid and by and with the consent and approval of said superintendent of the Klamath Indian School.

4. That the provisions of said contract with respect to the price to be paid for said timber are as follows:

"For and in consideration of the agreements by the superintendent the purchaser agrees that prior to March 31, 1929, he will cut and remove all timber covered by this contract and will pay to the superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber at fixed rates per thousand feet, board

measure of Scribner Decimal C rule log scale, which rates for specified periods of the contract shall be as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described. * * *

"The purchaser further agrees that prior to the time when the stumpage value of the timber cut from both unallotted and allotted lands shall exceed the cash deposit of forty thousand dollars ($40,000.00) submitted with his proposal to purchase timber, he will make another cash deposit of not less than ten thousand dollars ($10,000.00) to cover further cutting and that he will make additional deposits of ten thousand dollars ($10,000.00) each at such times as may be necessary to insure that the stumpage value of the timber cut and not paid for at any time shall not exceed the cash deposit then in the hands of the superintendent except that, subject to the requirements as to the maintenance of a constant credit balance, the last payment in any logging season may be in an amount not less than five thousand dollars ($5,000.00)."

5. That the cash deposits required by said contract have been made from time to time.

6. That said contract provides a method for an adjustment by the Commissioner of Indian Affairs for the three-year period beginning April 1, 1924, the provisions of the contract in this respect being as follows:

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar, and seventeen dollars ($17.00) for other species.

"In determining the stumpage rates to be designated for all timber scaled during the three-year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of twenty-two dollars and fifty cents ($22.50) and seventeen dollars ($17.00) stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations

and manufacture during the three-year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1924.

"Any advance in stumpage prices prescribed by the Commissioner for the three-year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner, a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; PROVIDED THAT the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract."

7. That the Commissioner of Indian Affairs made no increase for the three-year period beginning April 1, 1924, leaving the prices for said three-year period to be those stated in the contract.

8. That the contract provides for stumpage price adjustments by the Commissioner of Indian Affairs for the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, the provisions of the contract in this respect being as follows:

"For the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936 readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three-year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three-year period.

"Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period."

9. That the Commissioner of Indian Affairs made no increase in the prices as stated in said contract for the year beginning April 1, 1927.

10. That the average mill run wholesale net value of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1927, did not exceed the average mill run wholesale net value of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924; and that on a com-

parison of the value of $22.50 for yellow pine (which, as used
7 herein, includes the so-called "bull pine," sugar pine, and incense cedar), and $17.00 for other species and the cost of logging operations and lumber manufacture during the three years directly preceding January 1, 1920, with the average mill run wholesale net value of lumber f. o. b. said mills and the cost of logging operations and lumber manufacture during the three years directly preceding January 1, 1927, it will be found that there had not been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1927; and that on a comparison of said value of said lumber and said cost of logging operations and lumber manufacture during the year directly preceding January 1, 1928, with the said value of said lumber and said cost of logging operations and lumber manufacture for the three years directly preceding January 1, 1927, it will be found that there had not been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the year directly preceding January 1, 1928; and that on a comparison of said value of said lumber and the cost of logging operation and lumber manufacture during the year directly preceding January 1, 1929, with said value of said lumber and said cost of logging operations and lumber manufacture for the three years directly preceding January 1, 1927, or the year directly preceding January 1, 1928, it will be found
8 that there had not been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the year directly preceding January 1, 1929.

11. That the Commissioner of Indian Affairs was unauthorized and unwarranted under the terms and provisions of said contract in making any increase in the price of yellow pine for the year beginning April 1, 1928; but, nevertheless, prior to said date he gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine under said contract for the year beginning April 1, 1928, of $.40 per thousand feet, making said price $5.48 per thousand.

12. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine at any price in excess of $5.08 per thousand feet but defendant refused to heed such protest and appropriated moneys, deposited by the plaintiff, at the rate of $5.48 per thousand feet; that during said year the plaintiff cut under said contract 57,483,082 feet of yellow pine, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's money on deposit with it the sum of $.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of twenty-two thousand, nine hundred ninety-three and 23/100ths dollars ($22,993.23).

13. That the Commissioner of Indian Affairs was unauthorized and unwarranted under the terms and provisions of said contract in making any increase in the price of yellow pine for the year beginning April 1, 1929; out nevertheless, prior to said date, he gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine under said contract for the year beginning April 1, 1929, of $.40 per thousand feet, making said price $5.48 per thousand.

14. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine at any price in excess of $5.08 per thousand feet but defendant refused to heed such protest and appropriated moneys deposited by the plaintiff at the rate of $5.48 per thousand feet; that during said year beginning April 1, 1929, plaintiff cut under said contract 54,448,480 feet of yellow pine, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of $.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of twenty-one thousand, seven hundred seventy-nine and 39/100ths dollars ($21,779.39).

15. That although restitution thereof has been demanded by plaintiff, defendant has refused, and still refuses, to return to plaintiff the said sums so unlawfully collected from it, which amount in the aggregate to forty-four thousand, seven hundred seventy-two and 62/100ths dollars ($44,772.62).

16. That plaintiff is a citizen of the United States and has at all times borne true allegiance to the government thereof and has not in any way aided, abetted, or given encouragement to any of the enemies of the said government, and that the facts as stated in this petition are true.

17. That no other action as aforesaid has been had on this claim in Congress or any other department of the government; that plaintiff is the sole owner of this claim, and the only person interested therein; that no assignment or transfer thereof, or any part thereof, or of any interest therein, has been made, and that plaintiff is fully entitled to the amount herein claimed from the United States after the allowance of all just credits and off-sets.

Wherefore, plaintiff prays judgment for said sum of forty-four thousand, seven hundred seventy-two and 62/100ths dollars ($44,772.62), and such other and further relief as to the court plaintiff may appear to be entitled.

FOREST LUMBER COMPANY,
By R. B. WHITE, *President.*

CARL D. MATZ, *Attorney for Plaintiff.*

11 [*Duly sworn to by Raymond B. White; jurat omitted in printing.*]

12 *Exhibit A to petition*

DEPARTMENT OF THE INTERIOR, INDIAN SERVICE, FORESTRY BRANCH

TIMBER CONTRACT

Calimus-Marsh Unit:

This agreement entered into at Klamath Agency, Oregon, this 30th day of October, 1920, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 866, 857), between the Superintendent of the Klamath Indian School, hereinafter called the Superintendent, for and in behalf of the Klamath Tribe of Indians, party of the first part, and Williamson River Logging Company of Chiloquin, Oregon, party of the second part, hereinafter called the purchaser:

Witnesseth, That the Superintendent, in consideration of the agreement by the purchaser, agrees to sell to the purchaser upon the terms and conditions herein stated and the Indian Service General Timber Sale Regulations approved April 10, 1920, by the Assistant Secretary of the Interior and which are hereby made a part of this contract, all the merchantable dead timber, standing or fallen, and all the merchantable live timber marked or otherwise designated by the officer in charge for selecting logging as required by the General Timber Sale Regulations, comprising trees approximately eighteen inches and larger in diameter at a point four and one-half feet from the ground and estimated to be four hundred and fifty million feet, board measure, log scale, more or less, principally western
13 yellow pine, including so called "bull pine" on the unallotted lands within a tract of about 67,000 acres, known as the Calimus-Marsh Logging Unit, and more particularly defined by a boundary line drawn as follows:

Beginning at the north quarter corner of Section 36, Township 32 South, Range 7 East, thence east along section lines to the point on the divide on the north line of Section 35, Township 32 South, Range 8 East, which is the northeast corner of the Solomon Butte Logging Unit; thence southerly along east boundary of the said Solomon Butte Logging Unit to the center quarter corner of Section 25, Township 33 South, Range 8 East, thence due east along the divide to the center quarter corner of Section 29, Township 33 South, Range 9 East; thence following the divide north one-half mile, thence east to the southwest corner of Section 23, Township 33 South, Range 9 East, thence north one-half mile, thence east to the east quarter corner of said Section 23, thence in an easterly and southerly direction along the divide through Sections 24 and 25, Township 33 South, Range 9 East, Sections 30 and 31, Township 33 South, Range 10 East, and Sections 6 and 7, Township 34 South, Range 10 East, to the top of Calimus Butte, thence east along section line crossing top of said

butte to the southwest corner of Section 9, Township 34 South, Range 10 East, thence northerly and northeasterly along the divide to the middle quarter corner of Section 27, Township 33 South, Range 10 East; thence northerly and northwesterly along this divide to the north quarter corner of Section 2, Township 32 South, Range 9 East; thence northwest along the divide to a point in Klamath Marsh near the north sixteenth corner of the southwest quarter of Section 9, Township 31 South, Range 9 East; thence westerly and southwesterly along edge of said Klamath Marsh and of the Williamson River to the point of beginning.

And authorizes the purchaser to enter into separate contracts with Indians holding trust patented allotments within the limits of the area above defined (comprising about 2,500 acres with an estimated stand of about fourteen million feet) for the purchase of their timber subject to Indian Service regulations and according to the terms of this general contract and the General Timber Sale Regulations approved April 10, 1920.

For and in consideration of the agreements by the Superintendent the purchaser agrees that prior to March 31, 1939, he will cut and remove all timber covered by this Contract and will pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber at fixed rates per thousand feet, board measure of Scribner Decimal C rule log scale, which rates per specified periods of the contract shall be as follows:

(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so called "bull pine"), sugar pine, and incense cedar; and one dollar and eighty-five cents, for other species.

(b) For each of the three-year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

The purchaser further agrees that within six months from the date of approval of this contract he will enter into approved separate contracts of purchase with such Indians holding trust patented allotments within the above defined tracts as desired to sell their timber and that he will pay to the Superintendent in trust for such Indians the full value of the allotted timber covered by such contracts at the prices stipulated for unallotted timber and subject to the same regulations and the provisions as to the periodic increases in price; and he also agrees that within thirty days from the approval of the contract on any allotment he will pay ten per cent of the estimated value of the timber thereon as an advance payment, and further that within three years of the approval of such contract he will pay an additional fifteen per cent of the estimated value of the timber thereon as an advance payment.

The purchaser further agrees that prior to the time when the stumpage value of the timber cut from both unallotted and allotted lands shall exceed the cash deposit of forty thousand dollars ($40,000.00) submitted with his proposal to purchase timber, he will make another cash deposit of not less than ten thousand dollars ($10,000.00) to cover further cutting, and that he will make additional deposits of $10,000.00 each at such times as may be necessary to insure that the stumpage value of the timber cut and not paid for at any time shall not exceed the cash deposit then in the hands of the Superintendent, except that, subject to the requirements as to the maintenance of a constant credit balance, the last payment in any logging season may be in an amount not less than $5,000.00.

The purchaser further agrees that he will cut and remove from some portion of the sale area, including allotments, at least
16 twenty-five million feet board measure, log scale, prior to March 31, 1922, and not less than twenty-five million feet during each twelve months thereafter until the contract is completed; that he will remove and pay for, as merchantable timber, pieces ten feet and longer, will utilize the trees to a diameter of eight inches in the tops where straight and sound, and will pay for all logs on the basis of a scale recognizing sixteen feet as the maximum length of a single log; that all timber will be considered merchantable as provided for in the attached regulations, except that red and white fir must be one-half or more sound; and that he will conform with all requirements of the Indian Service General Timber Sale Regulations.

If the purchaser of this unit shall be the purchaser also of other units of timber on the Klamath Indian Reservation, logging performed by him on his other logging units will be accepted as performance on this contract provided the total minimum cut required by all his contracts is performed and provided he completes this contract within the period named but subject to the provisions of paragraph nine of the General Timber Sale Regulations.

For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the Superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellow pine (including so called "bull pine"), sugar pine and incense cedar, and seventeen dollars ($17.00) for other species.

17 In determining the stumpage rates to be designated for all timber scaled during the three year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of $22.50 and $17.00 stipulated in the preceding

paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three year period directly preceding January 1, 1924.

Any advance in stumpage prices prescribed by the Commissioner for the three year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit; provided that the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

For the three year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, readjustment of stumpage prices may be
18 made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three year period.

Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period.

It is further understood and agreed that this contract shall be null and void and of no effect until approved by the Secretary of the Interior and until the latter shall approve a bond of the purchaser in the penal sum of fifty thousand dollars ($50,000.00) conditioned on the faithful performance of all the terms of this contract and the regulations attached hereunto.

Signed and sealed in quadruplicate this thirtieth day of October 1920.

WILLIAMSON RIVER LOGGING COMPANY,
Purchaser.

Witnesses:
WALTER G. WEST, *Superintendent.*
F. M. GOODWIN, *Assistant Secretary.*

19 II. *History of proceedings*

On October 30, 1930, the defendant filed a general traverse to plaintiff's petition.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court June 12, 1934, and, on the same day the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following order on said plea:

ORDER

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December 1934, that said plea be and the same is overruled, without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

III. *Argument and submission of case*

On October 8, 1937, this case was argued and submitted on merits by Mr. Carl D. Matz and Mr. William S. Bennet, for plaintiff, and by Mr. James J. Sweeney, for defendant.

20 IV. *Special findings of fact, conclusions of law, and opinion of the court by Williams, J.*

Filed January 12, 1938

Messrs. Carl D. Matz and William S. Bennet for the plaintiff. Mr. Jesse Andrews was on the briefs.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for the defendant.

The court, upon the report of a commissioner and the evidence, makes the following

Special findings of fact

1. Forest Lumber Company, plaintiff, is a corporation organized under the laws of the State of Delaware, with its principal place of business in Kansas City, Missouri.

2. On August 10, 1920, the Assistant Secretary of the Interior approved a form of contract, pertinent regulations, and a form of advertisement for the sale of approximately 450,000,000 feet of timber, principally Western yellow pine. It was located on about 67,000 acres within Townships 31, 32, 33, and 34, Ranges 8, 9, and 10, Willam-

ette meridian, on what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. Included as a part of the total quantity of timber on the Calimus-Marsh Unit was about 14,000,000 feet of timber, on about 2,500 acres of allotted land, as to which, prospective bidders were informed, separately approved contracts, with the Indian owners, might probably be made. The form of contract, as approved, provided that it would continue in effect until March 31, 1939.

21 The advertisement required that sealed bids, in duplicate, be addressed to the Klamath Indian School, Klamath Agency, Oregon. Bids were to be received until 2 o'clock p. m., Pacific Time, on October 27, 1920. Each bidder was required to state in his bid the price that he would pay per M for yellow pine, sugar pine, incense cedar, and for other kinds of timber to be cut and scaled prior to April 1, 1924. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs for three-year periods. Prospective bidders were informed that no bid less than $4.00 for yellow pine, sugar pine, and incense cedar, and no less than $1.60 for other species, during the period ending March 31, 1924, would be considered. Each bid was to be accompanied by a certified check, on a solvent National Bank, drawn in favor of the Superintendent of the Klamath Indian School in the amount of $40,000.

3. On October 26, 1920, Williamson River Logging Company, in response to said published invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at $5.08 per M feet, and for all other species at $1.85 per M feet. A certified check in the sum of $40,000, drawn on the First National Bank of Klamath Falls, Oregon, payable to the Superintendent of the Klamath Indian School, accompanied the proposal. The proposal provided that in the event the Williamson River Logging Company failed to fulfill its agreement the amount of the check would be retained as liquidated damages, for the use and benefit of the Klamath Indians.

On October 30, 1920, a contract was signed by Williamson River Logging Company. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

4. On March 19, 1925, Modoc Pine Company acquired this contract by assignment from Williamson River Logging Company. On April 3, 1925, the assignment of the contract from the Williamson River Logging Company to the Modoc Pine Company was approved by the Superintendent of the Klamath Agency, Oregon, and on

22 April 22, 1925, said assignment was approved by the Assistant Secretary of the Interior.

On August 10, 1926, Forest Lumber Company, plaintiff herein, acquired the contract by assignment from the Modoc Pine Company. The assignment of the contract by the Modoc Pine Company to the Forest Lumber Company was approved by the Superintendent of

the Klamath Agency, Klamath, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

Under the contract, the Superintendent agreed to sell to the party of the second part all the merchantable dead timber, standing or fallen, and all the merchantable live timber marked or otherwis designated by the officer in charge for selective logging, as required by the General Timber Sale Regulations, estimated to be about 450,000,000 feet board measure, log scale, more or less, principally Western yellow pine, including so-called bull pine, on the unallotted lands within a tract of about 67,000 acres, known as the Calimus-Marsh Logging Unit within the Klamath Indian Reservation.

5. Said timber contract authorized the purchaser to enter into separate contracts with Indians holding trust patented allotments within the tract known as the Calimus-Marsh Logging Unit, for the purchase of their timber, subject to Indian Service regulations, and according to the terms of this general contract and the general timber sale regulations approved April 10, 1920.

Under the contract, the party of the second part agreed that prior to March 31, 1939, it would cut and remove all timber covered by the contract and pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber as should be determined by the actual scale of the timber at fixed rates per thousand feet, board measure, of Scribner Decimal C rule log scale.

Certain provisions of the contract are as follows:

"This agreement entered into at Klamath Agency, Oregon, this 30th day of October 1920, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 855, 857), between the Superintendent of the Klamath Indian School; hereinafter called the superintendent, for and in behalf of the Klamath Tribe of Indians, party of
23 the first part, and Williamson River Logging Company, of Chiloquin, Oregon, party of the second part, hereinafter called the purchaser: * * *

"For and in consideration of the agreements by the Superintendent the purchaser agrees that prior to March 31, 1939, he will cut and remove all timber covered by this Contract and will pay to the Superintendent, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual sale of the timber at fixed rates per thousand feet, board measure of Scribner Decimal C rule log scale, which rates per specified periods of the contract shall be as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called bull pine), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936 such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

* * * * * * *

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the Superintendent and the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellowpine (including the so-called 'bull-pine'), sugar pine, and incense cedar, and seventeen dollars ($17.00) for other species.

"In determining the stumpage rates to be designated for all timber scaled during the three year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of $22.50 and $17.00 stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture during the said three years will be compared with the cost of such operations and manufacture during the three year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on
24 logging and manufacturing operations during the three year period directly preceding January 1, 1924.

"An advance in stumpage prices prescribed by the Commissioner for the three year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924. In the discretion of the Commissioner a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit: Provided, That the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract.

"For the three year periods of the contract beginning April 1, 1927, 1930, and 1933, and 1936, readjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three year period.

"Notice of the new schedules of prices shall be given the purchaser by letter not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs a hearing will be afforded the purchaser upon written request presented at least fifteen days before the date upon which the new stumpage rates are to become effective for any period."

6. On June 28, 1922, and in conformity with the provisions of the contract, the Williamson River Logging Company furnished its bond in the penal sum of $50,000 to guarantee its faithful performance of the contract.

7. The first price adjustment period under the contract commenced April 1, 1924.

The Williamson River Logging Company experienced delays in commencing operations under its contract. On April 20, 1921, the company requested the Commissioner of Indian Affairs to grant it an extension of one year within which to begin cutting timber
25 under its contract. In a separate letter to the Commissioner on April 20, 1921, the company applied for an extension of 90 days from that date within which to file the bond required to guarantee performances of the contract. In its letters the company stated the extensions of time requested were necessary because of the then existing financial crisis which made it impossible for the company to obtain the necessary funds to extend its railroad facilities into the timber or to operate its sawmills. Its efforts to obtain suitable bondsmen were unavailing.

On April 23, 1921, the Commissioner, in a letter approved by the Assistant Secretary of the Interior, advised the company that his office was aware of the unusual financial conditions and the marked depression in the lumber market; that his office had no desire to insist upon a strict compliance with the terms of the contract that might result in loss to the company, and ultimately prove disadvantageous to the interests of the Indians; that he would waive the requirement of the contract respecting the quantities of timber to be cut prior to March 31, 1922, but desired that a properly executed and sufficient bond be filed at an early date. The company did not furnish the bond to guarantee performance of the contract until June 28, 1922. The bond and the contract were approved by the Assistant Secretary of the Interior on July 25, 1922.

On May 8, 1923, the attorney for Williamson River Logging Company addressed a lengthy letter to the Commissioner of Indian Affairs relative to the right of way for its logging railroad then under construction. This letter referred to the provisions of the Regulations forming a part of the timber purchase contract, and requested the Commissioner, in order to carry out the letter and spirit of the contract, to require the Central Pacific Railroad, in the construction of its railroad north of Kirk, Oregon, to permit the crossing of its right of way by logging railroads, particularly the railroad of Williamson River Logging Company, where necessary, and to construct such necessary crossings at its own expense.

The company in its letter advised the Commissioner that it
26 had already expended $122,000 in construction work on its railroad line, and that before completion of the main line it would have to expend at least an additional $100,000, not counting the construction of any crossing of the Central Pacific Railroad,

north of Kirk; that it was incumbent upon the Indian Service to see that contractors were not burdened with construction and operating costs, when it was within the power of the Indian Service to aid the contractor, to the ultimate profit of the Klamath Indians; that litigation might result in financial embarrassment to the company and prevent it from fulfilling its contract, at considerable loss to the Indians; that the Klamath Tribe was in need of funds, and under the contract would receive in excess of $2,000,000, whereas the sale of the right of way to the Central Pacific would not bring into the tribal funds more than $1,000; that the company should be given a preferential right of way over the right of way of the Central Pacific, and aided in every way so that its contract might be complied with and the Indians derive the greatest revenue from the sale of their tribal and individual timber.

The company had failed to cut the minimum quantities of timber called for by the contract for the period ending March 31, 1923. On May 18, 1923, the company, in a letter to the Commissioner, protested respecting the conditions sought to be imposed by the Superintendent of the Klamath Agency in connection with making up the deficit in cutting the minimum quantities of timber under the contract.

The company continued to suffer from conditions that prevented performance of the contract and in a letter of September 1, 1924, expressed to the Superintendent of the Klamath Agency its regret that conditions up to that time had prevented any operation in the Calimus-Marsh Unit during that contract year. The company failed to cut any timber during the contract year ending March 31, 1925, and advanced a special deposit of $5,000 on account of its previous delinquency for the year ending March 31, 1923.

8. Early in 1925 the properties of the Williamson River Logging Company were taken over by the Modoc Pine Company. On March 19, 1925, the president of the Modoc Pine Company wrote to the Commissioner of Indian Affairs advising that the Williamson
27 River Logging Company had assigned to the Modoc Pine Company, subject to the approval of the Superintendent of the Klamath Indian School and the Secretary of the Interior, the timber purchase agreement dated October 30, 1920, and that owing to the depressed conditions of the lumber market the Williamson River Logging Company did not operate in 1924 and that, accordingly, on March 31, 1925, there would be due and payable under the contract the sum of $127,000, representing the selling price of 25,000,000 feet of timber at $5.08 per M feet. The Modoc Pine Company requested that the payment of that sum be postponed upon such terms and conditions as might seem proper to the Bureau of Indian Affairs. The president of the Modoc Pine Company in his letter to the Commissioner, also pointed out that operations of the Williamson River Logging Company for the years 1921, 1922, 1923, and 1924 had shown a net loss of about $287,000. He also stated that the Modoc Pine Com-

pany stood ready to meet such requirements as might be made by the Office of Indian Affairs, and felt that the Commissioner would agree that the reorganization of the enterprise was in the best interests of the Klamath Indians.

On April 23, 1925, the Assistant Commissioner telegraphed the Superintendent of the Klamath Reservation:

"Advise Modoc Pine Company assignments and bond Williamson River Logging Company contract approved."

On April 22, 1925, the Assistant Secretary of the Interior approved a recommendation by the Assistant Commissioner of Indian Affairs to the effect that the Modoc Pine Company should be required to make immediate payment of $25,000, to be held until past delinquencies in the cutting of required quantities of timber under the contract had been cut and paid for.

On May 27, 1925, the Modoc Pine Company, in a letter to the Superintendent of the Klamath Agency, advised that the requirements of the Indian Office respecting the failure of the Williamson River Logging Company to cut the required minimum quantities of timber under the contract had been reasonable, but the recent destruction by fire of the Company's sawmill made it impossible
28 to make up the required deficit in cutting. The Superintendent was asked to recommend that the Commissioner of Indian Affairs not require the Company to make the special deposit of $25,000 and, also, to waive the requirement that the Company make up the deficit in the cutting of timber under the contract. The letter contained the following:

"We are fully aware that your entire concern in this and other matters is for the Klamath Tribe of Indians * * *. Only a successful operation on the reservation can be of the greatest benefit to those you represent."

On July 6, 1925, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burk to the effect that, because of the efforts made by the Modoc Pine Company to perform the contract and the recent destruction of its sawmill by fire, the company be relieved from the payment of the special deposit of $25,000, and also the requirement of making up the deficit that accrued under the contract for the period ending March 31, 1925.

On August 10, 1926, the Modoc Pine Company assigned the contract of October 30, 1920, to the Forest Lumber Company. On January 14, 1927, the Assistant Secretary of the Interior approved the recommendation of Commissioner Burke that the Department approve the assignment by the Modoc Pine Company, the acceptance by the Forest Lumber Company, and the bond furnished by the Forest Lumber Company.

9. The second price adjustment period under the contract commenced April 1, 1927.

On February 25, 1927, the Commissioner addressed a telegram to the Forest Lumber Company as follows:

"Stumpage price yellow and sugar pine, Calimus-Marsh Unit, in-
eased one dollar per thousand to become effective April first, nine-
en twenty eight."

On April 2, 1927, plaintiff wrote to the Commissioner respecting
is action in notifying it that the price of yellow and sugar pine for
ie adjustment period beginning April 1, 1927, would be increased
1.00 per thousand, but not effective until April 1, 1928. Plaintiff
said that on the basis of the then stumpage price of $5.08 per
thousand it had lost $1.02 per thousand for the year 1926 and,
in addition, $75,000 in inventory, due to shrinkage in the value
f lumber in the yard; that there was nothing in the then present
arket situation to justify the increase in stumpage made on the
alimus-Marsh Unit and other units in the Klamath Indian Reser-
ation, and requested that it be accorded a hearing.

In a telegram of January 19, 1928, to the Commissioner, plaintiff
id that it felt that any increase in the stumpage price under the
ontract was absolutely unjustified; that analysis had shown that the
alance of the timber was of poorer quality; that it was more scat-
red, required greater logging cost, and consisted of smaller sizes
an timber already logged; that log average for 1927 was only 267
et as compared with 311 feet the previous year; that it had pro-
uced 10 per cent more number three shop and lower grades in 1927
an during the previous year; that its 1927 cut was 15.8 per cent
nder the Government cruise; that in 1926 it lost over $1.00 per
ousand, in spite of its logging cost being lower than average Indian
mber operator; that it cut only one and one-half million feet per
ile of railroad in 1927 as compared to two and one-half million feet
1926; that its logging superintendent and managers estimated that
gging conditions and timber would be worse from then on and that
gging costs would be $2.00 or more per thousand higher than on
mber already cut; that actual loss on whole operations for 1927
ould be over $2.00 per thousand. Plaintiff asked the Commissioner
, in view of the above, he could advise that there would be no in-
ease in stumpage for the three year period ending March 31, 1930;
not, that plaintiff be given a hearing on January 27.

On the following day the Commissioner wired plaintiff's president
at he would be pleased to hear him on January 27, regarding the
lamath contract.

10. On February 2, 1928, the Commissioner wrote to Superintend-
t Arnold, of the Klamath Agency, concerning a conversation with
r. White, president of plaintiff company, respecting conditions
affecting the contract, and requested that the data submitted
by Mr. White be studied and that a report be furnished the
Commissioner. Said letter contained the following statement:

"While the Office does not concede that the arguments presented
emonstrate that an increase in price is not justifiable, it is readily
dmitted that the amount of timber that may be obtained from each
ile of railway built within the Unit has a very direct bearing on
ie value of the stumpage within such Unit."

During the early part of 1928 there was considerable correspondence between plaintiff and the Commissioner of Indian Affairs respecting the general surrounding conditions, and the quality and quantity of timber cut and to be cut on the Calimus-Marsh Unit. Plaintiff insisted that conditions as actually encountered disclosed that there was a considerable under-run, and that it was obtaining a smaller percentage of number two shop and better grades than it had expected to cut from the unit.

On March 16, 1928, the Commissioner telegraphed plaintiff that the Muck report would not be received before March 22, 1928, and suggested a conference during the week beginning March 26, 1928, if plaintiff desired a hearing respecting Klamath timber.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

"Increase one dollar price yellow pine Calimus-Marsh Unit reduced to forty cents effective April first, nineteen twenty eight can hear you any day between twenty sixth and thirtieth data furnished superintendent and Muck has been considered."

On August 30, 1928, plaintiff wrote to the Commissioner respecting his final action in increasing the stumpage price of yellow pine, sugar pine, and incense cedar by 40¢ per thousand feet, effective April 1, 1928. Plaintiff stated that it felt that no increase was justified for that year; that it had made the cash deposits to cover cutting of the timber, as called for by the contract, because it did not wish to subject itself to the liability of the contract being cancelled; that

31 no part of the deposits made should be applied, or should have been applied to the payment of stumpage at a rate in excess of $5.08 for yellow and sugar pines, and incense cedar; that it should be permitted to cut the timber during the remainder of the year at the contract rates. Plaintiff also gave notice that its protest was to be a continuing one, and that if payments were made at a rate greater than those specified in the contract for the respective species of timber, it would take such steps as might be necessary to recover from the Government the excess amount so paid. On September 10, 1928, plaintiff's letter was forwarded by the Commissioner to Superintendent Arnold, Mr. Kinney, and Mr. Muck, for report.

11. On October 26, 1928, Mr. Muck, Forest Valuation Engineer, and Mr. Kinney, Chief Supervisor of Forests, in a report prepared at the Klamath Indian Agency, Klamath, Oregon, and addressed to the Commissioner of Indian Affairs, stated that full consideration had been given to the facts and arguments presented by the plaintiff prior to April 1, 1928, and that every possible concession under the terms of the contract had been granted before final action was taken and the conservative increase of 40¢ per thousand made effective; that statements of the Forest Lumber Company for the year 1928 would not be available prior to February 1, 1929; that it was not believed the results from the operations would show the increased

stumpage price had been a serious burden; that in the Muck report of March 15, 1928, entitled "The Revaluation of the Timber under Contract on the Klamath Indian Reservation, Oregon," it was pointed out that the cost of logs, inclusive of stumpage at the Forest Lumber Company mill at Pine Ridge, Oregon, was very reasonable when compared with the district at large; that this log cost was not a material contributing factor to the losses reflected by the Company's operations during the years 1926 and 1927; that it was believed that this condition would continue during the year 1928, for the reason that there had been no material change in the factors involved, and that the conservative price increase of 40¢ could not possibly operate to impose a serious burden on the purchaser; that the reason for the unfavorable showing by the plaintiff at Pine Ridge was one of overinvestment in mill and plant, and unbalanced ratio be-
82 tween fixed capital and production; that these considerations could not be permitted to involve the value of timber on the Calimus-Marsh Unit; that the revaluation of the timber under the contract was based on the general rise in value which had taken place in this competitive field, and was essential for the protection of the Klamath Indians, and fully justified in the light of existing conditions; that the action respecting the increased stumpage price, effective April 1, 1928, was subsequently supported by the favorable trend in the lumber market which had occurred during the preceding six months; that the industry was making substantial progress; that the volume of business had increased materially, and that there had been a strengthening of price levels; that according to reports of the California White and Sugar Pine Manufacturers Association, production in Northern California and Southern Oregon showed an increase of over 12 per cent over the year prior, and that orders showed an increase of over 5 per cent; that orders exceeded production, and that many mills were booked far ahead; that the price of number two shop which had averaged $26.70 during 1927 had increased to $27.85 at the then present writing—in fact, that there had been a general upward trend in practically all grades, and that the average price of pine lumber f. o. b. mills in Southern Oregon and Northern California had advanced at least $1.00 per thousand over one year prior; that the outlook was generally favorable, and that the industry was in a more substantial position than had obtained during the preceding two years; that no action appeared necessary at the then present writing, and it was recommended that the matter be held in abeyance until after the first of the approaching year; that if an investigation of facts then available should show the increase effective April 1, 1928, to have been a burden on the Forest Lumber Company, the Commissioner, under the terms of the contract, would have discretion to relieve the purchaser of a part or all of the increase of 40¢ per thousand.

12. On May 23, 1929, plaintiff wrote to the Commissioner that it desired to renew the protest made by it on August 30, 1928,

33 against the increase of 40¢ per thousand feet for yellow pine (including so-called "bull pine"), sugar pine, and incense cedar, on the Calimus-Marsh Unit, under the contract of October 30, 1920, as to all deposits made of to be made during the year 1929.

During the year 1929 several letters passed between the Superintendent of the Klamath Agency and the Commissioner concerning plaintiff's complaint made early in 1928 to the effect that it had sustained an exceptionally low under-run on the Calimus-Marsh Unit. The Commissioner was advised by the Superintendent that he found that the company received a fair over-run, as compared with the over-run received at the different mills in that region; that the Service had been fair in its scaling methods, and that the low over-run was not due to the methods used by the Indian Service in the scaling of the timber but was due more to the manner in which over-run was computed by the Forest Lumber Company.

13. The third price adjustment period under the contract commenced April 1, 1930.

On January 11, 1930, the Commissioner forwarded to Superintendent Arnold, of the Klamath Indian Reservation, certain exhibits and reports that had been filed by the plaintiff at a hearing before the Assistant Secretary upon an appeal from the requirements of the Commissioner of Indian Affairs that the price of yellow pine on the Calimus-Marsh Unit be increased 40¢, effective April 1, 1928. The reports dealt with the quality of the timber, the topography, logging conditions, and costs experienced by the company. The Superintendent was advised that the Commissioner had forwarded to Mr. Muck, Forest Valuation Engineer, a copy of said letter and copies of the reports prepared by plaintiff's representatives; that it would be impracticable for Mr. Muck to make an examination of the Calimus-Marsh area, and requested that a full report respecting conditions on this area be prepared by the forestry employees at Klamath Agency and forwarded to Mr. Muck for his consideration and submission with his report to the Commissioner in connection with the next readjustment of stumpage prices on the Calimus-March Unit on April 1, 1930.

34 On January 11, 1930, the Commissioner forwarded to Mr. Muck, Forest Valuation Engineer, copies of the pertinent letter and reports, and directed that in his study of readjustment of stumpage prices on the Klamath Reservation, effective April 1, 1930, special consideration be given to the claim of the Forest Lumber Company that the timber remaining on the Calimus-Marsh Unit was inferior in quality, and that conditions were such that a stumpage price in excess of the original price of $5.08 per thousand on yellow pine could not be justified.

On February 15, 1930, the Commissioner wrote to plaintiff, advising that the third readjustment of stumpage prices on the Calimus-Marsh Unit would occur on April 1, 1930, and that the contract required notice of any increase to be given March 1, 1930; that there

had been so much delay on the part of the lumber companies in the Klamath District in furnishing financial statements that it would be difficult to make a complete study of the same in order that notice might be given prior to March 1st. Plaintiff was asked to advise whether it would consent to notice respecting possible price increases any time prior to April 1, 1930.

On February 26, 1930, plaintiff by telegram informed the Commissioner that it desired that he be fully informed as to the Company's situation before reaching his conclusion, and that it consented to notice being given it any time prior to April 1; that it was sure the Commissioner would bear in mind what had occurred at the hearing before First Assistant Secretary Dixon on the preceding December fifteenth.

14. On February 26, 1930, the Commissioner addressed the following telegram to plaintiff:

"There will be no increase on April first on Calimus Marsh unit above stumpage prices of five dollars and forty-eight cents and one dollar and eighty-five cents now being paid you will be advised later whether further study seems to justify a reduction on yellow pine, sugar pine, and incense cedar."

On February 27, 1930, the Commissioner addressed a letter to
35 Superintendent Arnold of the Klamath Agency, and enclosed copies to Mr. Muck, Forest Valuation Engineer, and James A. Haworth, Jr., lumber man at large, concerning the readjustment of stumpage prices under the contract. He stated that no increase was made on April 1, 1924, but for the second period beginning April 1, 1927, an increase of 40¢ was made effective, but that the purchaser was relieved from the payment of any increase beginning April 1, 1927; that a preliminary report by Mr. Muck, Forest Valuation Engineer, dated February 21, 1930, and concurred in by Mr. Haworth, recommended that no increase be made over the $5.48 per thousand feet for yellow pine, sugar pine, and incense cedar, and $1.85 for other species during the three-year period beginning April 1, 1930. He stated that a memorandum concurring in the recommendation, and signed by William H. Zeh, Supervisor of Forests at Klamath, and Superintendent Arnold, was on file; that Mr. J. P. Kinney, Chief Supervisor of Forests, and familiar with the history of the contract and the sale area, and who had reviewed the several financial statements submitted by Mr. Muck, also concurred in the view that an increase above the then present prices could not be justified; that a full report on the Klamath situation could not be presented by Mr. Muck at that time because of the failure of several lumber companies operating in the Klamath District to furnish their financial statements; that the Forest Lumber Company had urged a reduction in the price of yellow pine, sugar pine, and incense cedar to the price of $5.08, originally bid; that financial reports from other operators, and a full report on the re-cruise of the timber on the Calimus-Marsh Unit must be received and carefully analyzed before

a determination could be reached as to whether the requested reduction in price could be made. In the letter the Superintendent was directed to advise the Forest Lumber Company that the stumpage price for yellow pine, sugar pine, and incense cedar cut after March 31, 1930, would be $5.48, unless the investigation of the special conditions obtaining on the Calimus-Marsh should show that a reduction from the price of $5.48 was justifiable; and that the investigation would be completed at the earliest practicable date and
36 notice given him in order that he might inform the Forest Lumber Company of any reduction in price.

15. On April 8, 1930, plaintiff in a letter to the Commissioner of Indian Affairs expressed the hope that the investigation then being made would be completed at an early date, and the results would justify a reduction as requested by it; that conditions in the California market were quite bad, the market having dropped about $3.00 to $3.50 per thousand since early last fall; that it seemed certain that plaintiff was faced with a substantial loss in its operation for that year; that it assumed the relief, if granted, would be effective from the date the increased price was first made.

On April 29, 1930, the Commissioner addressed a letter to the plaintiff, which letter was approved by Assistant Secretary of the Interior Joseph M. Dixon on May 1, 1930, advising that after a re-cruise of the timber and a thorough examination of all factors connected with logging operations and quality of timber remaining on the Unit the conclusion had been reached that the interests of the Klamath Indians would be fully protected through a reduction of 40c from the existing price, effective April 1, 1930; that this reduction was made because plaintiff had established that the timber remaining on the Unit was of inferior quality; that logging would be comparatively expensive; that because of the damage to the timber by fire and insects the volume to be obtained from the remaining area of the Calimus-Marsh Unit was substantially below the volume as shown on the original cruise. The letter concluded:

"This action does not operate to relieve the Forest Lumber Company from the increase of 40c per thousand feet on the species above named that was effective from April 1, 1928, to April 1, 1930."

On May 6, 1930, Superintendent Arnold of the Klamath Agency in a letter to plaintiff advised that he had received notice from the Commissioner of Indian Affairs that the company had been granted a reduction in the stumpage price of yellow pine, sugar pine, and incense cedar on the Calimus-Marsh Unit from $5.48 to $5.08, effective April 1, 1930; that a credit would be allowed Forest Lumber Company on all deposits for timber scaled after April 1, 1930;
37 that the report mailed to plaintiff covering timber scaled during the month of April 1930, showed that the footage of yellow pine scaled was 5,090,350 feet; that a reduction of 40c per thousand on this footage amounted to $2,036.14; and that an entry had been made on the Klamath Agency records crediting the company's

account and increasing its advanced deposit balance by that amount.

16. On May 7, 1930, plaintiff wrote to the Commissioner that it appreciated his action in reducing the stumpage price of yellow pine, sugar pine, and incense cedar, from $5.48 to $5.08 per thousand effective April 1, 1930, but was disappointed to learn that he did not see fit to make the price reduction effective from April 1, 1928; that it felt that the showing made by it in its petition and conference justified the reduction of 40¢ to be made effective as of April 1, 1928, not only on account of the extremely unfavorable conditions on that unit, but also on account of the comparative values of lumber for the periods, as outlined in the contract. Plaintiff requested the Commissioner to again review the matter and advise whether he did not feel it proper to make the reduced price effective as of April 1, 1928.

On June 3, 1930, the Commissioner replied to plaintiff's letter of May 7, 1930, and advised that he was unwilling to make a reduction in price for the two years ending March 31, 1930.

On July 20, 1932, plaintiff requested the Commissioner to relieve it from cutting the minimum quantity of timber under the contract for the year ending March 31, 1933. The action thereon by the Commissioner in granting plaintiff's request was approved by First Assistant Secretary of the Interior Joseph M. Dixon, July 29, 1932.

Acting under authority of the act of June 25, 1910 (36 Stat. 855, 857), the act of March 4, 1933 (47 Stat. 1568), and the act of June 16, 1933 (48 Stat. 311), the original contract of October 30, 1920, was modified to provide for the reduction of the price of yellow pine (including so-called "bull pine") and sugar pine to $3.00. The prices of other species were also reduced.

The original contract as modified by the agreement of February 21, 1934, left plaintiff until March 31, 1939, to perform its contract.

38 17. From April 1, 1928, to March 31, 1929, plaintiff cut 57,483,080 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals $22,993.23.

From April 1, 1929, to March 31, 1930, plaintiff cut 54,448,480 feet board measure of yellow and sugar pine. That quantity of timber, at 40¢ a thousand feet board measure, totals $21,779.39.

The total quantity of yellow and sugar pine cut by the plaintiff during the contract periods beginning with April 1, 1928, and ending March 31, 1930, totalled 111,931,560 feet board measure. That quantity of timber at 40¢ a thousand feet board measure, totals $44,772.62.

18. During the period between January 14, 1927 (the date on which the Assistant Secretary of the Interior approved the acceptance by the plaintiff of the assignment from the Modoc Pine Company of the contract of October 30, 1920), and March 31, 1930 (the end of the period during which the 40¢ increase remained effective), plaintiff paid an average stumpage of $5.28 per thousand feet board measure.

On January 22, 1927, the Assistant Secretary of the Interior approved the assignment to the plaintiff of a contract dated July 30, 1924, for the purchase by the Fremont Land Company of timber on the North Marsh Timber Unit in the Klamath Indian Reservation. The initial price stipulated in the contract for the first period ending March 31, 1928, for yellow pine and sugar pine was $5.53. The contract provided for a fixed increase in the stumpage rates during the remaining three-year periods, specified therein. A 12% increase in price became effective April 1, 1928, advancing the price for yellow and sugar pine to $6.19. In the acquisition of this contract, plaintiff paid a premium above the original stumpage price of $5.53 stipulated in the contract.

19. During the period of 14 years prior to 1931, the Indian Service made an exhaustive investigation and study of the comparative production costs and selling price trends of timber within the Klamath Region, for the purpose of establishing a basis which would guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

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The area specified in the contract of October 30, 1920, as "Southern Oregon and Northern California" has always been understood, by lumbermen and engineers familiar with the locality, as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry, and is composed primarily of Klamath County, Oregon, and small parts of Lake County, Oregon, and Modoc County, California. Topographically, this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin, and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service had compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data had been abstrated from the certified operating statements from the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract that official assigned an expert timber valuation engineer to make a special study of pro-

duction costs, and of sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly
40 familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends of timber within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports are comprehensive, and give effect to every factor affecting the trend of production costs and selling prices.

20. The statistical studies and reports made by the Valuation Engineer showed that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of $17.49 in 1917, to a high of $42.44 in 1920. Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to $24.73 in 1927, rising again to $25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of $15.33 per M feet in 1917, to a high of $30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being $28.01 per M feet, and gradually declined thereafter to $23.38 in 1928, again rising to $25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of $3.25 to a high of $8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The graph evidencing the trend of stumpage prices within this competitive area reflected only a comparatively slight increase in prices during and immediately following the years of highest sales prices for lumber, namely, 1919 to 1923. It showed frequent recessions in the stumpage price trend during that period. In 1917 the average sale price of stumpage within the competitive area was $3.44, whereas 10 years later the average sale price of stumpage within the Klamath Region was $7.64 per M feet.

21. The average mill run, net wholesale prices of California white and sugar pines, applicable to the Forest Lumber Company contract, for the respective three-year periods here involved, were, as shown by the defendant's "Exhibit R," page 82, as follows: For the
41 years 1917, 1918, and 1919, $23.10; for the years 1921, 1922, and 1923, $30.26; and for the years 1924, 1925, and 1926, $27.00.

22. The contract was to extend from October 30, 1920, to March 31, 1939. It specified that the prices for pine stumpage for the period ending March 31, 1924, should be $5.08 per thousand feet board measure, and for the three-year periods of the contract term beginning April 1, in the years 1924, 1927, 1930, 1933, and 1936, such prices as

should be fixed by the Commissioner of Indian Affairs, in the manner therein prescribed.

The parties agreed that the rates to be fixed by the Commissioner for each of the three-year periods specified should be determined, after a careful consideration of the cost of logging operations and lumber manufacture, in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California regions, during the three years preceding January 1 of each year in which the new rates were to be fixed.

The contract provided that such new rates should lie wholly within the discretion of the Commissioner of Indian Affairs; that a hearing should be afforded the purchaser, upon written request made at least 15 days before the date upon which the new stumpage rates were to be made effective; and that the new schedule should be determined, and notice given to the purchaser not later than the first day in March in the years 1924, 1927, 1930, 1933, and 1936.

As a basis of comparison in fixing the readjusted prices under the contract it was agreed therein that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three-year period ending January 1, 1920, was $22.50 for yellow pine.

The only limitation imposed by the contract on the discretionary authority of the Commissioner, in the matter of fixing the stumpage rates to be paid during the three-year periods specified in the contract, was the provision that such stumpage rates—

"* * * shall not exceed 50% of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during
42 the three years directly preceding January 1, 1924. In the discretion of the Commissioner, a reduction in the stumpage price of any species may subsequently be made to correct any error or to afford the purchaser relief from a market depression that deprives the purchaser of a substantial margin of profit: Provided that the stumpage prices of no species will ever be reduced below the rate bid for the initial period of the contract."

23. The first price adjustment period stipulated in the contract was to commence on April 1, 1924. On February 25, 1924, the Commissioner wired the Chief Clerk, Klamath Agency, Oregon:

"Exhaustive consideration all factors involved indicates no increase in stumpage prices should be made on Cliff Boundary, Solomon Butte, Little Sprague, Chiloquin, and Calimus-Marsh Units. Advise purchasers."

The Williamson River Logging Company, one of plaintiff's predecessors in title, had, from the inception of the contract, experienced financial difficulties, and was in default in cutting the required quantities of timber under the contract. Shortly thereafter, the affairs of that company underwent a reorganization, and in 1925 the

contract was assigned to the Modoc Pine Company, plaintiff's immediate predecessor in title.

Following the approval by the Assistant Secretary of the Interior on January 14, 1927, of the assignment of the contract from the Modoc Pine Company to the plaintiff, the question respecting the readjustment of stumpage prices for the second contract period, beginning April 1, 1927, came before the Commissioner.

As required by the contract, plaintiff was notified by the Commissioner on February 25, 1927, that commencing April 1, 1927, the price of pine stumpage on the Calimus-Marsh Unit would be increased by $1.00 per thousand feet board measure, but that the increase would not become effective until April 1, 1928. The action of the Commissioner in suspending until April 1, 1928, the price increase made effective by him under the contract on April 1, 1927, was taken because of the depressed condition of the lumber market in that year.

43 On March 28, 1928, the Commissioner notified plaintiff that he had reduced the increased price of pine stumpage on the Calimus-Marsh Unit from $1.00 to 40¢, effective April 1, 1928. Plaintiff protested that the proposed increase was not warranted, in view of conditions then existing in the lumber industry, stating that the company was operating at a loss. Plaintiff also submitted to the Commissioner data to support its contention that logging conditions and the quality of timber on the Calimus-Marsh Unit would not enable it to operate at a profit.

On February 26, 1930, the Commissioner notified plaintiff that there would be no increase on April 1, 1930, on the Calimus-Marsh Unit, above the price of $5.48 then being paid for pine stumpage and that he would advise plaintiff later whether further study seemed to justify a reduction in that price.

On April 29, 1930, the Commissioner notified plaintiff that after a re-cruise of the timber, and a thorough examination of all factors affecting logging operations and the quality of timber remaining on the Unit, he had concluded that the interests of the Klamath Indians would be fully protected through a reduction of 40¢ from the existing price, effective April 1, 1930, making the stumpage price payable for yellow and sugar pine after that date $5.08, which was the price originally fixed in the contract. Plaintiff was expressly advised, however, that this action would not relieve it from the increase of 40¢ per thousand feet for yellow and sugar pine from April 1, 1928, to March 31, 1930.

Following the passage of permissive legislation the contract was modified on February 21, 1934, and the price of pine stumpage reduced to $3.00 per thousand feet. The modification of the contract was consented to by the Klamath Indians in General Council. It was approved by the Secretary of the Interior on March 3, 1934.

24. The comparative cost studies, conducted by the Valuation Engineer and his assistants under the direction of the Commissioner of

Indian Affairs, indicated that prior to 1925, sales of stumpage within the Klamath Reservation had remained at reasonably conservative levels. Beginning with 1925, and thereafter, the prices within
44 that region rose to abnormally high levels, due primarily to the keen competition for such stumpage. The intial price for pine stumpage, under the contract, was $5.08, and was to remain effective during the contract period ending March 31, 1924. That initial price of $5.08 remained effective until April 1, 1928, at which time it was increased by 40¢, making the stumpage price, effective on that date, $5.48 per thousand feet. That increase was later reduced, and, effective April 1, 1930, the price was again fixed at $5.08 per thousand feet for yellow and sugar pine.

During the same period stumpage prices for timber within the Klamath Region had risen, in some instances to $8.00 per thousand feet, in 1926 and 1927. The average stumpage price, under competitive bidding, during 1926 and 1927 was $7.63. In 1928 that average dropped to $5.00, rising again to $6.92 in 1929.

25. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the act of June 25, 1910, Sections 7 and 8 (36 Stat. 855, 857). Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed the procedure to be followed in the sale of the timber and the disposition of the proceeds thereof.

The Secretary of the Interior also approved forms of advertisement and contracts to be used by the respective superintendents of Indian reservations in the sale of timber, upon either unallotted or allotted lands, which forms were made a part of the regulations. The standard Form of Contract was used in making the contract involved in this suit. The form of contract of October 30, 1920, except for minor modifications and a provision for a fixed 12% increase in the price of stumpage every three years, had been used in every sale of timber on Indian reservations since the passage of the act of June 25, 1910. Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were similar in form to the contract of October 30, 1920, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the
45 sale of timber on Indian reservations under the act of June 25, 1910, was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold, the procedure was for the Superintendent of the Indian reservation to advertise definite units of timber for sale, accept bids, and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made. The contract was then prepared in the form prescribed by the regulations and signed by the Superintendent on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian

Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract. Under the provisions of the contract of October 30, 1920, the purchaser agreed that within six months from the date of approval of the contract it would enter into approved separate contracts of purchase with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell their timber thereon. These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract. Contracts for the sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior. According to the record, no contracts for the sale of Indian tribal timber were ever made in the form and manner prescribed by R. S. 2103. Such contracts have always been made in substantial compliance with the form of contract made by the purchaser herein on October 30, 1920.

26. The contract of October 30, 1920, was to be performed prior to March 31, 1939. The record does not disclose the amounts of money already paid under the contract by the plaintiff and its predecessors in interest.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provided that the proceeds of the sales of timber on any Indian reservation, except those of the Five Civilized Tribes, should be covered into the Treasury under
46 the caption "Indian moneys, proceeds of labor," for the benefit of such tribes, and under such regulations as the Secretary of the Interior should prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any United States Indian agent, or superintendent, to deposit Indian moneys, individual or tribal, coming into

his hands as custodian, in such private banks as he might select, subject, however, to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury such tribal funds as were susceptible of segregation, and to credit an equal share thereof to each member of that tribe, and to deposit the funds in private banks, subject to withdrawal, for payment to the individual owners, or expenditure for their benefit.

27. The record discloses that all moneys paid by the purchaser to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of October 30, 1920, and the several allotment contracts made thereunder with individual Indian owners, less the sum of 8% thereof, were deposited by the Superintendent, either in private State banks or in the Treasury of the United States, to the credit of the tribal or individual Indians concerned. The contract of October 30, 1920, and the several contracts made by the purchaser with the holders of allotments were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. No part of the net proceeds inured to the benefit of the United States. The proceeds arising under the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians."

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The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with paragraph 21 of the [illegible]ded regulations approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920. These acts authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incident to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales. This 8% was deducted by the superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses incident to administering the contract of sale and the Indian forests. It was deposited in the Treasury, to the credit of the United States, under the caption "Miscellaneous Receipts."

Upon receipt of proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Tribe of Indians, as well as the individual Indian allottees concerned. This action was based upon scale reports made by civil service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or disbursing officer of the Indian Agency, who held such moneys in trust for the respec-

48 tive Indian allottees. The banks selected as depositaries for individual Indian moneys kept no record of the individual Indian accounts. These trust funds were subject to withdrawal by the Superintendent of the reservation, and were distributed by him to the individual owners thereof, under regulations prescribed by the Commissioner of Indian Affairs and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

28. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion but authorized the Secretary of the Interior to expend such funds for "equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments." During the period from 1922 to 1934, per capita payments in excess of $6,200,000 were made direct to the Klamath Indians on account of the proceeds derived from the sale of timber on that reservation. Competent Indians were paid their share of the per capita payments directly. The per capita shares of other Indians were deposited to their accounts, and the expenditure thereof was subject to departmental regulations.

Prior to 1927 it was the practice for the Superintendent of the Klamath Indian Reservation to submit accounts of all the Indian moneys in his possession to the Office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of superintendents concerning Indian moneys in their possession.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $44,772.62.

It is therefore adjudged and ordered that the plaintiff recover
49 of and from the United States the sum of forty four thousand seven hundred seventy two dollars and sixty-two cents ($44,772.62):

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

Plaintiff in this suit seeks to recover the sum of $44,772.62, alleged to have been illegally collected by the defendant as a part of the contract price for certain timber sold by the defendant to the plaintiff.

On August 10, 1920, pursuant to act of June 25, 1910 (36 Stat. 855), the Assistant Secretary of the Interior approved a form of contract and pertinent regulations, and also a form of advertisement, for the

sale of approximately 450,000,000 feet of timber located on about 67,000 acres of what was known as Calimus-Marsh Unit, Klamath Indian Reservation, Oregon. The advertisement required that sealed bids, in duplicate, be addressed to Klamath Indian School, Klamath Agency, Oregon. Each bidder was required to state in his bid the price that he would pay per M feet for yellow pine, sugar pine, incense cedar, and for other kinds of timber cut and scaled prior to April 1, 1924. The advertisement stated that the prices, subsequent to April 1, 1924, were to be fixed by the Commissioner of Indian Affairs, for three-year periods.

On October 26, 1920, Williamson River Logging Company, in response to the invitation for bids, made its proposal, addressed to the Superintendent, Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow pine, sugar pine, and incense cedar at $5.08 per M feet; and for all other species at $1.85 per M feet. On October 30, 1920, a contract was signed by Williamson River Logging Conmpany. On July 25, 1922, it was approved by the Assistant Secretary of the Interior.

On March 19, 1925, Modoc Pine Company acquired the contract by assignment from Williamson River Logging Company. On April 3, 1925, this assignment was approved by the Superintendent of the Klamath Agency, Klamath, Oregon, and on April 22, 1925, by the Assistant Secretary of the Interior.

On August 10, 1926, plaintiff acquired the contract by assign-
50 ment from the Modoc Pine Company. This assignment was approved by the Superintendent of the Klamath Agency, Klamath Falls, Oregon, on December 27, 1926, and by the Assistant Secretary of the Interior on January 14, 1927.

The contract provided that the timber covered in the contract should be cut and removed by the purchaser prior to March 31, 1939, and that the purchaser should pay for such timber its value as specified in the contract, as follows:

"(a) For the period ending March 31, 1924, five dollars and eight cents for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar; and one dollar and eighty-five cents for other species.

"(b) For each of the three year periods of the contract term beginning April 1st in the years 1924, 1927, 1930, 1933, and 1936, such prices for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described."

The contract provides the precise method for an adjustment by the Commissioner of Indian Affairs of the stumpage rates to be paid by plaintiff for the three-year period beginning April 1, 1924, and also for each of the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, as follows:

"For purposes of stumpage price adjustments by the Commissioner of Indian Affairs at the close of the first period of the contract as specified above, it is hereby stipulated by the superintendent and

the purchaser that the average mill run wholesale net value per thousand feet lumber measurement f. o. b. mills in Southern Oregon and Northern California, during the three years ending January 1, 1920, have been twenty-two dollars and fifty cents ($22.50) for yellow pine (including so-called 'bull pine'), sugar pine, and incense cedar, and seventeen dollars ($17.00) for other species.

"In determining the stumpage rates to be designated for all timber scaled during the three-year period beginning April 1, 1924, the average mill run wholesale net values of lumber f. o. b. mills operating in Southern Oregon and Northern California during the three years directly preceding January 1, 1924, will be compared with the values of twenty-two dollars and fifty cents ($22.50) and seventeen dollars ($17.00) stipulated in the preceding paragraph as basic values, and the cost of logging operations and lumber manufacture
51 during the said three years will be compared with the cost of such operations and manufacture during the three-year period preceding January 1, 1920, for the purpose of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacturing operations during the three-year period directly preceding January 1, 1924."

The first period for which the Commissioner of Indian Affairs could increase stumpage rates provided in the contract was for the three-year period beginning April 1, 1924. However, he made no increase in stumpage rates for that period and notified plaintiff's predecessor to that effect on February 25, 1924. The next three-year period for which an increase could be made, if the facts warranted it, was that beginning April 1, 1927. The Commissioner on February 25, 1927, notified plaintiff that stumpage prices provided in the contract would be increased $1.00 per M feet to become effective April 1, 1928. The plaintiff upon the receipt of this notice immediately wrote the Commissioner of Indian Affairs protesting against the increase, saying that on the basis of the then stumpage price of $5.08 per M feet it had lost $1.02 per M feet for the year 1926, and that there was nothing in the then market situation to justify the increase. This protest was renewed on January 19, 1928, by telegram, in which plaintiff pointed out in great detail its reasons for protesting the increase and requested that it be given a hearing. Following this telegram there was considerable correspondence between the plaintiff and the Commissioner respecting the general conditions, and the quality and quantity of timber cut and to be cut. On March 24, 1928, the Commissioner informed the plaintiff by telegram that the increase of $1.00 per M feet would be reduced to 40 cents per M feet effective April 1, 1928. The increased price went into effect April 1, 1928, and remained in effect to March 31, 1930, during which period plaintiff cut 111,931,560 feet of yellow and sugar pines. That quantity at the increased rate of 40 cents per M feet amounts to $44,772.62, the amount involved in suit.

The authority of the Commissioner of Indian Affairs to
52 make an increase of 40 cents per M feet in the stumpage rates during the period April 1, 1928, to March 31, 1930, constitutes the sole issue in the case. The relevant facts bearing on this issue, while apparently somewhat complicated, are in fact quite simple. Although, in the language of the contract, "the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs," the contract places an important limitation on his discretionary power to increase stumpage prices by the provision:

"Any advance in stumpage prices prescribed by the Commissioner for the three-year period beginning April 1, 1924, shall not exceed fifty per cent of the difference between the average mill run wholesale net value of lumber of that species f. o. b. mills as stipulated above and that for the same species during the three years directly preceding January 1, 1924."

The limitation on the authority of the Commissioner to make advance in stumpage rates for the three-year period beginning April 1, 1924, is likewise applicable to each of the subsequent three-year periods of the contract by the following provision:

"For the three-year periods of the contract beginning April 1, 1927, 1930, 1933, and 1936, re-adjustment of stumpage prices may be made in the same manner as for the period beginning April 1, 1924, except that the prices determined and used for the preceding three-year period will in each case be considered as the stipulated prices that are to be compared with the average prices obtaining during the succeeding three-year period."

While the Commissioner in determining the stumpage rates to be designated for timber cut during the three-year period beginning April 1, 1927, was required by the contract to compare the cost of logging operations and lumber manufacture during the three-year period preceding April 1, 1927, with the three-year period preceding April 1, 1924, for the purpose "of ascertaining, so far as is practicable, whether there has been generally in the lumber industry in the specified region an increase in the margin of profit on logging and manufacture operations" during the three-year period directly preceding April 1, 1927, he was without authority, whatever such
53 comparison might show, to increase the price of stumpage for the coming three-year period more than 50% of the net increased sales price of lumber for the current three-year period over the price of lumber for the preceding three-year period. There was an actual decrease in the wholesale price of lumber f. o. b. mills during the three-year period beginning April 1, 1924, over the wholesale price of lumber during the preceding three-year period. This is established by proof adduced by the defendant in its Exhibit "R," page 82, showing that the wholesale price for M feet in the Klamath District was $30.26 for the three-year period April 1921, 1922, and 1923, and that the wholesale price for the three-year period 1924, 1925, and 1926 averaged $27.00 per M feet. This fact is recognized by the defendant in its brief:

"At the outset we concede and the record shows that during the pertinent three-year periods, namely 1924–1926, there was a decrease in the wholesale price of lumber as compared with the preceding three-year period specified in the contract, namely, 1921–1923. The defendant adduced proofs to establish these facts."

In view of these conceded facts, it is clear that the Commissioner of Indian Affairs was without authority to make an increase in stumpage prices for the period beginning April 1, 1927. He was not only without authority to make an increase in stumpage prices for that period, but he was prohibited from so doing by the plain provisions of the contract. The defendant, however, contends that the Commissioner of Indian Affairs and plaintiff, particularly plaintiff's predecessors in title, had throughout the performance of the contract, and before any controversy respecting it had arisen, put a practical interpretation upon the contract at variance with its terms. It is contended that this practical interpretation is controlling and authorized the Commissioner to make the price increase in question. It is urged that the unanticipated economic exigencies that followed the post-war period and which continued for several years thereafter, and also the financial difficulties suffered by plaintiff's predecessors in title, made it necessary for the Commissioner in dealing with plaintiff and its predecessors to depart from the literal terms
54 of the contract and put upon it a practical interpretation in order to work out substantial justice between the purchaser and the Indians. It is particularly urged that under the strict terms of the contract the Commissioner could have made a substantial increase in stumpage prices for the period beginning April 1, 1924, but that because of the practical interpretation put upon the contract by the parties he made no such increase, and by so doing departed from the strict terms of the contract in order to benefit plaintiff. The defendant says that if the practical interpretation put upon the contract for the benefit of plaintiff and its predecessors can be sustained as a valid exercise of the discretion vested in the Commissioner, then it follows necessarily that the discretionary action of the Commissioner in increasing the price of stumpage by 40 cents per M feet for the benefit of the Klamath Indians, effective April 1, 1928, was likewise a valid exercise of the discretion vested in him by the contract.

We think the contention of the defendant is without merit. It is true that the Commissioner of Indian Affairs made certain concessions to plaintiff's predecessors because of financial difficulties and other obstacles encountered by them in the early stages of performance of the contract. These concessions, however, had no relation to stumpage prices to be paid under the contract and have no materiality to the issue presented. There is no evidence whatever in the record to justify the contention that the Commissioner of Indian Affairs departed from the strict terms of the contract in any way in not advancing stumpage prices to plaintiff's predecessors for the three-year period beginning April 1, 1924. The mere fact that the wholesale

prices of lumber during the preceding three-year period were such that the Commissioner was authorized to advance stumpage prices for the period beginning April 1, 1924, had he seen fit to do so, does not show that his action in not making an increase was a concession to plaintiff not contemplated in the contract. Many factors other than the wholesale price of lumber necessarily entered into the Commissioner's determination to increase or not to increase stumpage prices for the period beginning April 1, 1924. It must be assumed
55 the Commissioner performed his duty in good faith and that his decision not to increase stumpage prices for the period was fully justified by the facts on which his determination was based. Furthermore, what the Commissioner may have done in 1924 is immaterial to the issue in this case. The contract divides the time in which the contract is to be performed into periods of three years each. Price adjustments are to be made in the same manner for each of the periods. The determination of the new rates to be fixed for each adjustment period "lie wholly within the discretion of the Commissioner of Indian Affairs" with the sole limitation that no increase shall be made in excess of 50% of the wholesale increase in the value of lumber during the preceding three-year period over the value of lumber during the designated three-year period preceding. Each three-year period stands on its own bottom, and the fact that the Commissioner in his discretion declines to make an increase in stumpage prices for a period when he had authority to do so has no relevancy whatever to the price adjustment made by him for any other three-year period provided in the contract. The contention, therefore, that the increased stumpage price of 40 cents per M feet, here involved, was a valid exercise of the discretion vested in the Commissioner of Indian Affairs by the contract, is not sustained.

The defendant further contends that the contract sued upon is not a contract with the United States within the meaning of section 145 of the Judicial Code, and that the suit is, therefore, not maintainable under the Court's general grant of jurisdiction. It is urged that in making the contract the defendant's officials were merely acting for the Indians in their behalf and for their interest, and that consequently there was no responsibility on the part of the defendant for the performance of the contract. In other words it is contended the contract is not a contract by the defendant but a contract of the Klamath Indians. The contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe
56 of Indians." The contract referred to the Klamath Indians as the "party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was

ot the agent of the Indians is clear. An agent is one who acts for nother under authority given by the other party. The Government lid not act under any authority given by the Indians. It acted in its wn right somewhat in the manner that a guardian might act for ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was cting for the Government, and in what the Government did it was cting under its own rights and powers. It was not authorized by he Indians to make the contract nor was it approved by them, it was pproved by the Secretary of the Interior. While the Indians had a eneficial interest in the timber to be cut they lacked power to dis- ose of it, and any contract made by them would not be binding; nd, as it would not be binding upon the Indians, it would not be inding upon the other party and would be merely a nullity. The ontract was executed and approved by the officials of the defendant n strict accordance with the laws of the United States. Undoubtedly, he contract is a contract of the defendant within the meaning of ection 145 of the Judicial Code.

From what has been said it follows that the plaintiff is entitled to recover. Judgment is therefore awarded the plaintiff in the sum of $44,772.62. It is so ordered.

WHALEY, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

57 V. *Judgment*

At a Court of Claims held at the City of Washington on the 12th day of January, A. D. 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-four thousand seven hundred seventy-two dollars and sixty-two cents ($44,772.62).

VI. *Proceedings after entry of judgment*

On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial.

On March 12, 1938, said motion was allowed by the Court.

On April 13, 1938, the defendant filed its motion for a new trial.

On May 2, 1938, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of May 1938, that the defendant's motion for new trial be and the same is overruled.

58 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1938

CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 247

THE UNITED STATES, PETITIONER

vs.

LAMM LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 2, 1938
CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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THE UNITED STATES, PETITIONER

vs.

LAMM LUMBER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED AUGUST 2, 1938

INDEX

1

In the Court of Claims

No. K-533

LAMM LUMBER COMPANY

v.

THE UNITED STATES OF AMERICA

I. *Petition*

Filed December 11, 1929

TO THE HONORABLE CHIEF JUSTICE AND JUDGES OF THE COURT OF CLAIMS:

The Petitioner, Lamm Lumber Company sues the Defendant, The United States of America, and for its cause of action alleges and says as follows:

FIRST COUNT

I

Petitioner, The Lamm Lumber Company, is a Corporation duly organized and existing under the Statutes of the State of Oregon, and has its principal office at Modoc Point, State of Oregon, and brings this action through and under its duly constituted Attorney, Ralph H. Case, 900 National Press Building, Washington, D. C., whose authority is set out in a Power of Attorney filed with this Petition.

2

II

That Petitioner, Lamm Lumber Company, entered into into contract and gave bond for performance on or about August 27th, 1917, with the United States of America, Defendant herein, for the purchase of the timber on a certain tract of land, known and designated as the Southern Mt. Scott Unit, on Klamath Indian Reservation, in the State of Oregon, a copy of which said contract and bond is attached hereto and is prayed to be taken and read as a part hereof, and is marked "Petitioner's Exhibit A."

III

The aforesaid contract included within the boundaries of the land therein described, and from which Petitioner was authorized and obligated to cut and remove certain timber in accordance with the terms thereof, the following described tract of land, to-wit:

"The northeast quarter of Section 30, Township 33 South, Range 7, East Willamette Meridian, Klamath County, Oregon."

IV

That the above last described tract of land had been, prior to the execution of said contract, alloted to a certain Indian by the name of John Cole, Jr., who was, at the time of the making of the said contract, a minor and under the guardianship of Defendant herein, and a Trust Patent had been issued in the name of John Cole,
3 Jr., under which the United States held the legal title in trust for said John Cole, Jr.

V

That under and by the terms of the contract between Petitioner and Defendant, Petitioner was charged and obligated with the duty of making and entering into a contract with the allottee, John Cole, Jr., but by and through his father and natural guardian, and under the supervision of and approval by the Superintendent of the Klamath Indian School and Agency of Defendant, and further upon the approval by the Commissioner of Indian Affairs, said provision of the contract aforesaid, being as follows:

"The sale area includes 23 allotments comprising approximately 3600 acres as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for the unalloted lands."

VI

That on or about the 24th day of June, 1918, Petitioner entered into a contract under authority of the Act of Congress of June
4 25th, 1910 (36 Stat. 855, 857), with one John Cole, father and natural guardian of John Cole, Jr., a minor, and Indian, under the jurisdiction of the Superintendent of the Klamath Indian School, allottee to whom had theretofore been issued a Trust Patent, as aforesaid, for the above-described northeast quarter of Section 30, Township 33 South, Range 7, East Willamette Meridian, Klamath County, Oregon; whereby and whereunder Petitioner purchased from said Indian all of the standing timber on the aforesaid described tract, which came within the provisions of Petitioner's said contract with Defendant herein, at a price and under condition in said contract set out, a copy of which contract is attached hereto, and prayed to be taken and read as a part hereof, and marked "Petitioner's Exhibit B."

VII

That the contract between Petitioner and John Cole, fathe and natural guardian of John Cole, Jr., minor, the allottee aforesaid, was duly approved by Acting Commissioner of Indian Affairs E. B. Merritt, on July 18th, 1918, in compliance with the terms of Petitioner's contract (Exhibit A) with Defendant, and that in accordance with Petitioner's Prime Contract, and the subordinate contract made in behalf of John Cole, Jr., Petitioner, paid to Defendant the sum of six hundred and fifty dollars ($650.00).

VIII

That subsequent to the making of the contract between Petitioner and Defendant, and subsequent to the making of the subordinate contract between Petitioner and the Guardian of John Cole,
5 Jr., the said John Cole, Jr., died, and thereafter under the authority of the Act of June 25th, 1910, 36 Stats. L. 855, the Secretary of the Interior officially determined the heirs of said decedent, John Cole, Jr., which said finding recites that the father of decedent, to-wit: John Cole, was the sole heir of decedent.

IX

That thereafter John Cole, father of decedent, John Cole, Jr., applied for a patent in fee to the aforesaid land, heretofore allotted as Allotment 1011, to the aforesaid John Cole, Jr., and that Defendant herein, through its duly constituted officers, thereupon issued to John Cole as sole heir of John Cole, Jr., a patent in fee simple to the above-described land, without regard for the servitude with which said land was burdened by Petitioner's contract with Defendant, (Exhibit A), and Petitioner's subordinate contract with said identical John Cole (Exhibit B), in consequence of which, the said John Cole (Sr.), without regard for Petitioner's rights, became and was possessed of a record title in fee simple to the above-described land.

X

Thereafter the said John Cole (Sr.) sold the above-described land and conveyed the same into one Luke B. Walker, and that the said Luke B. Walker shortly thereafter served notice on Petitioner herein, the Lamm Lumber Company, that he was the owner of the above-described land, and as well the timber thereon, and said Walker
6 demanded of Petitioner herein that it either pay him, the said Walker, for the timber hereon, or that it (Petitioner) refrain from cutting timber on said described land.

XI

Petitioner thereupon notified the Bureau of Indian Affairs, Department of the Interior, of the facts above recited, and said Bureau

demanded of Petitioner and required of it that it proceed to the cutting of and payment for the timber on the above-described land, and said Bureau insisted and demanded that Petitioner comply strictly with its contract (Exhibit A), and its subordinate contract (Exhibit B).

XII

Petitioner was then and subsequently remainder under bond for the explicit performance of its contract with Defendant (Exhibit A), and was compelled by the terms thereof, to cut and remove the timber covered by and included in its contract with Defendant (Exhibit A), which Petitioner did thereafter proceed to do and did cut and market the timber on the aforesaid tract of land, and in the regular course of business, and in accordance with Petitioner's contract with Defendant, did pay for the said timber in accordance with Petitioner's contract with Defendant.

XIII

That the aforesaid Luke E. Walker, claiming title from the aforesaid John Cole (Sr.), filed suit against Petitioner herein for
7 treble damages under Section 346 of the Code of Laws of the State of Oregon, which reads as follows:

"Whenever any person shall willfully injure or sever from the land of another any produce thereof, or shall cut down, girdle, or otherwise injure, or carry off any tree, timber, or shrub, on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city, against the person committing such trespasses, or any of *htem*, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be; provided, that in any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the aforesaid mentioned acts, it shall be prima facie evidence that such acts were done and committed by defendant willfully, intentionally, and without plaintiff's consent. (L. 1925, c. 14, p. 24.)"

XIV

That Petitioner by the aforesaid wrongful action of Defendant, was put in jeopardy, to the extent of three times the value of the timber cut and removed from the aforesaid land, and that the said Walker claimed and alleged in his said suit that he was in fact and in law a bona-fide purchaser without notice of the existence of the aforesaid contract between Petitioner and Defendant, and the subordinate contract between Petitioner and John Cole (Sr.).

8

XV

That Defendant, although requested, declined to intervene in said action and wholly neglected to defend the Petitioner's title to the timber on the land hereinabove described. WHEREUPON, upon advice of counsel, Petitioner settled with the aforesaid Luke E. Walker by payment of the sum of fifteen thousand dollars ($15,000.00).

XVI

Petitioner upon the first notice to it that the record title to the said timber was no longer in John Cole, Jr., but as a matter of record was in the aforesaid Luke E. Walker, notified Defendant, through its instrumentality, the Bureau of Indian Affairs, which Bureau thereupon and thereafter withheld payment from John Cole (Sr.), sole heir of John Cole, Jr., for timber cut and removed from the aforesaid described land, all of which said timber, under the contract (Exhibit A) has heretofore been removed, and valued, and paid for by Petitioner in the sum of twelve thousand, eight hundred sixty-nine dollars, thirty-one cents ($12,869.31).

XVII

Thereafter the Defendant, upon demand, returned to Petitioner herein the sum of eleven thousand, one hundred eighty-nine dollars, seventy-seven cents ($11,189.77), but did not return to Petitioner the advance payment of six hundred fifty dollars ($650.00) above referred to, and further deducted from the payments made by Petitioner to Defendant the amount of eight percentum (8%) of the gross
9 value of logs removed from the said quarter section, to-wit: one thousand twenty-nine dollars, fifty-four cents ($1,029.54).

That, by reason of the negligence, wrongful acts of Defendant in issuing to the aforesaid John Cole (Sr.), a patent in fee without noting thereon a servitude under which said land then labored, the Petitioner herein, by reason of the acts of Defendant, has expended over and above restitution by Defendant, the sum of three thousand eight hundred ten dollars twenty-three cents ($3,810.23), and in addition thereto, has been put to certain necessary expenses which Petitioners has paid as follows, to-wit:

Attorney fee to Manning, McCulloch, and Driscoll	$1,000.00
Telephone calls (long distance) and telegrams paid by Manning, McCulloch & Driscoll, and which we have reimbursed them	7.20
Appearance fee to Clerk	5.00
1926, RRR. Garage, auto hire on Reservation	15.80
3-23-28 Continuation of Abstract on NE¼ of 30-33-7	5.00
4-6-28 Witness fees and mileage to John Cole	23.00
4-7-28 to County Clerk for certified copies of deeds	2.75
4-17-28 Sheriff's fee in serving subpoena	3.60
6-18-28 Recording Satisfaction of Mortgage	.60
6-18-28 Recording Deed from Walker	.80
Total	$1,063.75

in all $4,873.98.

For which sum Petitioner prays judgment against Defendant as hereinafter set out.

10 SECOND COUNT

XVIII

Petitioner further alleges that the aforesaid contract of August 27th, 1917 (Exhibit A), provided the amount in dollars which Petitioner was required to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the timber cut and removed under said contract; in the following language, to-wit;

"For and in consideration of the foregoing Lamm Lumber Co., party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C. scale, which rates for the specified periods of the contract shall be as follows:

'For the period ending March 31st, 1920, Three dollars and twenty-five cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine, and fifty cents per thousand feet board measure for white fir.

'For the three year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

11 'It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lumber manufacturer in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedule shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

'It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three

years preceding January 1, of the year in which the new prices are fixed.

'As a basis for comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and North California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents ($15.75) for yellow pine (including bull
12 pine and sugar pine, and thirteen dollars and fifty cents ($13.50) for white fir.'

"Under the last above quoted provisions of the aforesaid contract, the Commissioner of Indian Affairs gave notice and did fix the price of said timber, which price became effective April 1, 1923, and correspondingly did give notice and did fix the price of said timber, under said contract, which became effective April 1, 1926, and that the fixing of the price as of the date of April 1, 1926, under and in accordance with the terms of the contract, said price remained established and could not be changed by the Commissioner of Indian Affairs, until, and upon due notice, and not before April 1, 1929."

XIX

That during the three years preceding January 1, 1928, there was no increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California, neither was there any such increase during the three years preceding January 1, 1929.

XX

Notwithstanding the prohibitions and conditions contained in said contract, and alleged in the last two paragraphs hereof, the Commissioner of Indian Affairs did on April 1, 1928, arbitrarily, and without excuse or justification, and in violation of the aforesaid contract of August 27th, 1917, by his order, increase the price per thousand board feet of timber cut and removed by Petitioner, in the sum of forty cents ($.40) over and above the contract price as es-
13 tablished April 1, 1926, for each one thousand board feet of timber cut and removed by Petitioner, so that in addition to the said established price, Petitioner was ordered to pay the increase of forty cents ($.40) per thousand board feet, and said increase in price was enforced from and after April 1, 1928, to and including April 30th, 1929, during which period Petitioner cut and removed thirty million, three hundred fifteen thousand, nine hundred eighty (30,315,980) board feet of white pine, and twenty-nine thousand, one hundred sixty (29,160) board feet of other species. There was charged against and collected from Petitioner herein, the over charge of forty cents for each one thousand feet board measure of pine, i. e., a total of twelve thousand, one hundred twenty-six dollars, thirty-nine

cents ($12,126.39) was collected from Petitioner in violation of its said contract, which sum, Defendant retains, and although restitution thereof has been demanded by Petitioner, the Defendant has refused and still refuses to return to the Petitioner the said sum so unlawfully collected from it.

Wherefore, petitioner prays judgment against Defendant in the amount of twelve thousand, one hundred twenty-six dollars, thirty-nine cents ($12,126.39), as hereinafter set out.

XXI

Petitioner further alleges that it is the sole owner of the above claim, that no assignment or transfer of the same, or any part thereof
14 has been made, that Petitioner is justly entitled to the total amounts claimed in Counts One and Two hereof, to-wit:

$ 4,873.98 in Count One,
12,126.39 in Count Two, a total of

$17,000.37,

from the United States, Defendant, hereinafter allowing all just credits and offsets; that Petitioner is a citizen of the United States, being a body corporated as aforesaid, and has, at all times, borne true allegiance to the Government of the United States, and has not, in any way, aided, abetted, or given encouragement to rebellion against the Government of the United States, and that it believes the facts as stated in this Petition, to be true.

Wherefore, Petitioner prays judgment for such sum of money as may be justly due and owing to it, to-wit: $17,000.37, and such further and other relief to which it may appear Petitioner is entitled.

LAMM LUMBER COMPANY,
By RALPH H. CASE,
Attorney-in-Fact.

RALPH H. CASE,
900 National Press Building, Washington, D. C.,
Attorney of Record.

15 [*Duly sworn to by Ralph H. Case; jurat omitted in printing.*]

16 Petitioner's Exhibit A

TIMBER CONTRACT—KLAMATH INDIAN RESERVATION

This agreement made and entered into at the Klamath Indian School, State of Oregon, this 27th day of June 1917, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855–857), and the Regulations and instructions for officers in charge of forests on Indian Reservations, approved June 29, 1911, as amended March

, 1917, between the Superintendent of the Klamath Indian School,
r and on behalf of the Klamath Indians, party of the first part,
d The Lamm Lumber Company of Modoc Point, State of Oregon,
rty of the second part.

Witnesseth: That the party of the first part, agrees to sell to the
id Lamm Lumber Company, party of the second part, upon the
rms and conditions herein stated, all the merchantable dead timber,
anding or fallen, and all the live timber marked, or otherwise desig-
ted for cutting by the proper officer of the Indian Service, esti-
ated to be approximately one hundred sixty million feet, board
easure, log scale, of pine timber (approximately ninety-five per
nt yellow pine and five per cent sugar pine) and about ten million
et of white fir, located upon the designated area of approximately
,500 acres as hereinafter described.

For and in consideration of the foregoing, Lamm Lumber Co.,
rty of the second part, agrees to pay to the Superintendent of the
lamath Indian School, State of Oregon, for the use and benefit of
e Klamath Tribe of Indians, the full value of the said timber,
shall be determined by the actual scale of the timber as it shall
be cut, at fixed rates per thousand feet board measure Schibner
Decimal C. scale, which rates for the specified periods of the
contract shall be as follows:

For the period ending March 31st, 1920, Three dollars and twenty-
e cents per thousand feet board measure for yellow pine (includ-
g so called bull pine), and sugar pine, and fifty cents per thousand
et board measure for white fir.

For the three year periods of the contract term beginning April
1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices
r thousand feet board measure for each species as shall be fixed
the Commissioner of Indian Affairs in the manner hereinafter
scribed.

It is agreed between the parties to this contract that the rates
be designated by the Commissioner of Indian Affairs for each of
e said three year periods after April 1, 1920, shall be determined
er a careful consideration of the cost of logging operations and
lumber manufacture in comparison with the prevailing market
ices for timber products in the Southern Oregon and Northern
lifornia region during the three years preceding January 1 of each
ar in which each new schedule of prices is fixed. Although the de-
mination of the new rates shall lie wholly within the discretion of
e Commissioner of Indian Affairs, a hearing will be afforded the
rchaser upon request presented at least thirty days before the date
on which the new stumpage rates are to become effective for any
riod. The new schedule shall be determined and notice thereof
ven the purchaser on or before February 1, 1920, February 1, 1923,
bruary 1, 1926, February 1, 1929.

It is agreed further that the advance in stumpage rates as deter-
ned at the close of each specified period shall not exceed fifty

per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed.

18 As a basis for comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents ($15.75) for yellow pine (including bull pine) and sugar pine, and thirteen dollars and fifty cents ($13.50) for white fir.

It is agreed by the party of the first part that the cutting of White Fir shall be optional with the purchaser, except that trees of these species, containing fifty per cent merchantable timber which are seriously injured in the logging operations shall be taken or paid for.

And The Lamm Lumber Company, party of the second part further agrees to cut and remove the said timber in strict accordance with the following conditions and all Regulations governing timber sales prescribed by the Secretary of the Interior.

1. The Term "Officer in Charge" whenever used in these Regulations, signifies the Officer designated by the Commissioner of Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. The sale includes an area of approximately 11,500 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

Beginning at the ¼ corner of Sec. 35, Township 32 S., and Sec. 2, Township 33 S., Range 7 E., thence east to Williamson River; thence south along Williamson River until it enters a canyon; thence in a southerly and south-westerly direction along the top of the rim rock to the south ¼ corner of Sec. 22, Township 33 S., Range 7 E.,

19 thence west on township line to line between Ranges 7 and 7½ E; thence north on range line to north line of Reservation; thence along north and west boundary of Reservation to East and West ¼ line of Sec. 18, Township 33 S., R. 7 E., thence east approximately 1¾ miles; thence north one mile, thence east ½ mile, thence north ½ mile, thence east 1 mile; thence north ½ mile; thence east 1 mile; thence north ½ mile to place of beginning.

The sale area includes 23 allotments comprising approximately 3,600 acres as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted lands.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber other than for construction purposes will begin on or before July 1, 1918. Not less than twelve million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twelve million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than $10,000.00 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum
20 not less than $2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

5. The timber upon valid land claims is exempted from sale and all timber to which there exists valid claims under contract with an officer of the Interior Department, or an Indian allottee, is exempted from this sale.

6. No timber will be cut until it has been paid for and no timber will be removed from the sale area until it has been scaled and stamped by the officer in charge.

7. No timber will be cut except from the area specified by the Officer in charge. No live timber will be cut except that marked or otherwise designated by the officer in charge. All dead timber standing or fallen, which is sound enough for lumber of any merchantable grade, and all green trees marked or otherwise designated for cutting by the officer in charge will be cut.

8. All merchantable timber used in buildings, skidways, bridges, construction of roads, or other improvements will be paid for at the contract price.

9. No unnecessary damage will be done to young growth or to trees left standing. Unmarked trees that are badly damaged during the process of logging will be cut if required by the officer in charge, and when such damage is due to carelessness, will be paid for at twice the price fixed by the contract. Unmarked living trees that are cut without the special direction of the officer in charge will also be scaled and paid for at twice the contract price.

10. Stumps will be cut so as to cause the least possible waste, and will not be cut higher than 18 inches on the side adjacent to the highest ground, lower when possible, except in unusual cases when, in the direction of the officer in charge, this height is considered impracticable.

11. All trees will be utilized to as low a diameter in the
21 tops as possible so as to cause the least waste, and to a minimum diameter of 8 inches when the tops are straight and

sound; the log lengths will be so varied as to make this possible. All merchantable logs twelve feet or over in length will be taken, and shorter logs which are taken will be paid for.

12. Tops will be lopped and all brush piled compactly at a safe distance from living trees, or otherwise disposed of, as directed by the officer in charge. When required by officer in charge the brush and slash shall be burned by the purchaser at such times and under such precautions as the officer in charge may prescribe.

13. The timber will be scaled by competent scalers selected by the Commissioner of Indian Affairs. Timber will be scaled by the Decimal C. Scribner Rule and if required by the officer in charge will be skidded for scaling as he may direct. The maximum scaling length of all logs will be 16 feet; greater lengths will be scaled as two or more logs; on all logs four inches additional length will be allowed for trimming; logs overrunning this limit will be scaled as two feet longer. Logs containing not less than 33⅓ per cent of merchantable timber will be considered merchantable. Hewn railroad ties whose widest diameter inside the bark at the small end exceeds 12 inches will be scaled; smaller hewn ties will be counted and 50 ties considered equivalent to 1,000 feet B. M. diameters will be measured inside the bark at the tops of the logs and recorded at the nearest inch above or below the actual average diameter.

14. All cutting shall be done with a saw when possible. Marked trees or merchantable dead trees left uncut, timber wasted in tops, stumps and partially sound logs, trees left lodged in the process of falling, and any timber merchantable according to the terms of the contract which is cut and not removed from the sale area before logging on that portion of the area is completed, or is left within any part of the sale area after the expiration of the contract, shall be scaled and paid for. Both dead and marked green trees and snags considered a fire menace by the officer in charge will be felled but only such portions of them as are merchantable under the terms of the contract need be logged and paid for. Double scale will be charged for such trees if left uncut.

15. During the contract the purchaser and all of his employees, subcontractors, and employees of subcontractors shall do all in their power both independently and upon the request of forest officers to prevent and suppress forest fires. Unless prevented by circumstances beyond his control the purchaser, together with his employees, subcontractors, and employees of subcontractors, will be placed at the disposal of any authorized officer of the Indian Service for the purpose of fighting fires, provided that if the fire does not threaten the property of the purchaser or the area embraced in the contract, he will be reimbursed for services so rendered, unless the purchaser is directly or indirectly responsible for the origin of the fire.

16. So far as is reasonable, all branches of the logging shall keep pace with one another, and in no instances shall the brush disposal be allowed to fall behind the cutting except when the depth of snow or other adequate reason makes proper disposal impossible, when the disposal of the brush may with the written consent of the officer

in charge be postponed until conditions are more favorable. Operations shall be continued on each unit of the sale area as determined by the officer in charge until the logging of each unit is completed to his satisfaction.

17. Necessary skid roads, log chutes, camps, buildings, or other structures will be located as agreed upon with the officer in charge. Logging railroads within the reservation may be constructed under free permits to be issued by the Commissioner of Indian Affairs. The way for such railroad shall be cut free from combustible
23 materials for a distance of fifty feet on each side of the tract where such clearing is considered necessary by the officer in charge as a precaution against forest fires. Sawmills constructed in connection with timber operations upon the reservation shall be constructed under permits issued by the Commissioner of Indian Affairs. Bonds in addition to that submitted in support of the contract, shall not be required, provided that the timber sale bond shall also cover the terms of such permits. Commissaries, construction camps and all other buildings and improvements constructed upon the sale area or other Indian lands in connection with logging or railroad operation will be constructed under permits issued by the Superintendent of the Klamath Indian School. Such permits will require that the ground in the vicinity of all structures shall be kept in a sanitary condition; that all rubbish shall be removed and burned or buried or otherwise disposed of as directed by the officer in charge; that when camps or other buldings are abandoned or removed, all debris shall be burned or otherwise disposed of as directed by the officer in charge; and that all buildings or other structures shall be removed from the sale area within six months from the date of the termination of the contract or become the property of the United States in trust for the Klamath Indians. Telephone lines shall be constructed under permits issued by the Superintendent of the Klamath Indian School. Such permits will provide that free use of such lines shall be allowed to Indian Service officers for official business and that no stumpage charge will be made for poles used in construction of these lines, if in the judgment of the officer in charge, they are of sufficient value to the Indian Service to make this concession equitable. All other telephone lines, trails, and traveled roads traversing the cutting area, which are now constructed or shall hereafter be constructed by other parties than the
24 purchaser, shall be kept open and free at all times from obstruction by logs, brush and debris caused by logging operations, and all telephone lines, trails, and roads damaged or destroyed by logging operations shall be repaired or rebuilt as required by the officer in charge.

18. Donkey engines or steam skidders will be used in logging only with the written approval of the Superintendent of the Klamath Indian School, and only on areas in which the damage to remaining timber and reproduction will be negligible.

19. Oil shall be used for fuel in locomotives and traction engines unless the written consent of the officer in charge is first obtained for

the use of other fuel. All locomotives, donkey engines, or other steam power engines when not burning oil, shall each be equipped with an efficient spark arrester, which is satisfactory to the officer in charge. Donkey engines shall be equipped with a steam pump with no less than a 1-inch discharge, 150 feet of fire hose, 6 buckets and a constant supply of the equivalent of 6 barrels of water, and at least 5 shovels, this equipment to be suitable for fire fighting purposes and to be so used when necessary.

20. At each setting of each Donkey engine or other steam logging contrivance in which oil is not used as fuel, the ground shall be cleared of all inflammable material for a distance of 50 feet in all directions. During the period from June 1 to October 1 of each year no donkey engine or other steam logging contrivance in actual use for which oil is not used for fuel shall be left during the noon hour without a watchman and during the same period the purchaser may be required to employ a night watchman to guard against the escape of fire from logging engines.

21. No rigging shall be slung upon trees left for seed unless absolutely necessary. Where it is necessary to fasten chockers or straps around trees which are to be left for seed they shall be protected from girdling by first encircling the trees with suitable poles or blocks of wood.

22. The approximate minimum diameter limited at a point four and one-half feet from the ground to which living trees are to be cut is 18 inches. Trees above these diameters may be reserved for seed or protection and merchantable trees below these diameters may be marked at the discretion of the officer in charge.

23. The purchaser will pay for damage to property of the Indians growing out of his operations under the sale. The purchaser shall comply with all Regulations relative to the maintenance of order on Indian reservations. Indian labor shall be employed in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

24. The title of the timber covered by the contract shall not pass to the purchaser until it has been paid for and sealed, measured, or counted.

25. All questions relative to the location of railroad spurs, the exact areas to be logged, the location of all structures and the requirements to be observed in their construction and other matters concerned, with the operations of the purchaser upon the sale area shall be settled by the officer in charge. Final decisions as to points involved in the interpretation of the Regulations and provisions of the contract governing the sale, cutting and removal of the timber shall be rendered by the Secretary of the Interior. Work may be suspended by the officer in charge if the terms of the contract are disregarded, and the violation of any one of such terms, if persisted in, shall be sufficient cause for the revocation of the contract and the cancellation of other permits and privileges.

26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

26 27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

28. All books pertaining to the logging operations and the milling business of the purchaser, will be open to inspection at any time by an officer authorized by the Commissioner of Indian Affairs and to make such inspection with the understanding and agreement that any information obtained through such inspection shall be considered confidential and without the consent of the purchaser, shall not be disclosed to anyone except those connected with the government service.

29. No member of or Delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (see sections 114 and 116, act of March 4, 1909, entitled "An act to Codify, Revise, and Amend the Penal Laws of the United States," 33 Stat. 1088, 1109) and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract. (See Executive Order of May 18, 1905.) The cutting or removal of timber from Indian lands in breach of the terms of any contract, and without lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by Section 6 of the Act of June 25, 1910 (36 Stat. L., 855, 857).

30. As a further guarante of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of Thirty Thousand Dollars ($30,000) and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agree-
27 ment shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

LAMM LUMBER COMPANY.

_____,
(Signature of Purchaser.)

_____,
(Signature of Purchaser.)

C. H. ASBURY,
(Superintendent Klamath Indian School.)

Witness:

_____

_____

_____

_____

Approved Aug. 27, 1917,
By: S. G. HOPKINS,
1st Asst. Secy.

87107—38——3

"INDIAN SERVICE—BOND

"Know all men by these presents, that the Lamm Lumber Company of Modoc Point, State of Oregon, a corporation organized and existing under the laws of the State of Oregon, having an office and principal place of business at Modoc Point in the State of Oregon, as principal, and Stampe Q. Lamm of Danville, State of Illinois, and Edward S. Moore, of Danville, State of Illinois, as sureties are held and firmly bound unto the United States of America in the penal sum of Thirty Thousand and No/100 dollars ($30,000.00) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, each of us, our heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents.

28 "Sealed with our seals and dated this the 24th day of November, 1927. The conditions of this obligation is such that"

Whereas the Lamm Lumber Company principal, herein, did on the 31st day of May 1917 propose to purchase at the rate of Three dollars and twenty-five cents for Yellow Pine and Sugar Pine, and fifty cents for White Fir per M Feet B. M. Log Scale for the period ending March one, 1920, and such prices for each species as shall be fixed by the commissioner of Indian Affairs, during the remaining years of the contract period ending April one, 1932. The dates for readjusting the prices to be April one, 1920, April one, 1923, April one, 1926, and April one, 1929, on certain lands within the Klamath Indian Reservation in Oregon described as follows, to-wit:

Beginning at the ¼ corner of Sec. 35, Twn. 32 S and Sec. 2 Twn. 33 S Range 7 Eth east to Williamson River; Th south along Williamson River until it enters a Canyon; Th. in a southerly and southwesterly direction along the top of the rim rock to the south ¼ corner of Sec. 32, Twn. 33 S Range 7 E Th. west on township line to line between Ranges 7 and 7½ E. Th north on range line to north line of Reservation Th. along north and west boundary to east and west ¼ line of sec. 18 T. 33 S R 7 E, Th. east 1¾ miles Th. north one mile Th. East ½ miles Th. north ½ mile. Th. E 1 mile, th. N. ½ mile Th. E. 1 mile, Th. n. 1 mile, and did stipulate and agree that if the said proposal was accepted by the Secretary of the Interior the proposal and its acceptance should constitute a binding contract for the sale of said timber, and that said principal would cut, fell, remove, and pay for said timber in accordance with the regulations accompanying the proposal, and

Whereas, said Secretary of the Interior did on the 22nd day of June, 1917, duly accept said proposal and the proposal thereupon became a binding contract, as evidenced by a formal agreement executed on June 27th, 1917.

29 Now, Therefore, if the above bounden Lamm Lumber Company, its heirs, executors, administrators, successors, and assigns, shall faithfully conform to and observe all the laws and regula-

tions made and which shall be hereafter made for the governing of trade and intercourse with the Indians, and in no respect violate the same and conduce all timber operations in accordance with said regulations and all provisions of the contract entered into with the said Secretary of the Interior and C. H. Ashbury and in no respect violate said regulations or contract, or either of them, then and in that event, this obligation shall be null and void; otherwise it shall remain in full force and effect.

In witness whereof, we hereunto set our hands and seals this the twenty-fourth day of November, 1917.

[LAMM LBR. CO. SEAL] EDWARD C. LAMM,
President.

ETHEL LAMM, *Sect'y.*

Two witnesses required to signature of each principal and surety. Principals and sureties sign and affix seals.

[SEAL] LAMM LBR. COMPANY,
By W. E. LAMM,
Vice President,
Modoc Point, Ore.

Witnesses:
JESSIE FRANCE, *Danville, Ill.*
J. L. E. FLEMING, *Danville, Ill.*

[SEAL] STAMPER Q. LAMM,
Danville, Ill.

JESSIE FRANCE, *Danville, Ill.*
J. E. FLEMING, *Danville, Ill.*

EDWARD S. MOORE,
Danville, Ill.

JESSIE FRANCE, *Danville, Ill.*
J. E. FLEMING, *Danville, Ill.*

30 STATE OF ILLINOIS,
County of Vermilion, SS:

On this the 17th day of December, 1917, before me, Fred L. Draper, A United States Commissioner in and for the said county, personally came Stamper Q. Lamm and Edward S. Moore, who signed the foregoing obligation each to me known, who being by me duly sworn, did each for himself, depose and say that he was more than twenty one years of age and in all respects fully competent to make and enter into contract, and that they owned and possessed property not exempt by law from execution and above their debts and liabilities and free from incumbrances.

Stamper Q. Lamm to the amount of Thirty Thousand dollars ($30,000.00) and Edward S. Moore, to the amount of Thirty Thousand dollars ($30,000.00).

STAMPER Q. LAMM,
EDWARD S. MOORE.

Signature of Notary Fred L. Draper, United States Commissioner Eastern District Illinois. My commission expires May 1, 1921.

If the bond is executed in the District of Columbia the following certificate must be signed by a United States Officer other than a Notary Public. If executed elsewhere by a Judge of the United States Court, an United States District Attorney, a United States postmaster (or such other office of the United States as may be acceptable to the Secretary of the Interior) residing in the district where the bond is executed.

Eastern District Illinois, December 17, 1921.

Stamper Q. Lamm and Edward S. Moore, the sureties who have signed the foregoing bond are known to me as residents of
31 Danville, Illinois, and citizens of the United States, and that I believe them to be amply sufficient security for the amount thereof and that the bond is good.

FRED L. DRAPER.
U. S. Commissioner,
Eastern District Illinois.

Department of the Interior, January 24, 1918.

Approved:

S. G. HOPKINS, *Assistant Secretary.*

32 *Petitioner's Exhibit B*

5-489. Duplicate. Allotment No. 1011.

DEPARTMENT OF THE INTERIOR, INDIAN SERVICE

TIMBER CONTRACT

This agreement, made and entered into at the Klamath Indian School, Klamath Agency, State of Oregon, this 24th day of June, 1918, under authority of the Act of Congress of June 25, 1910 (36 Stat. L., 855, 857), between John Cole, father and natural guardian of John W. Cole, minor, an Indian under the jurisdiction of the Superintendent of the Klamath Indian School, party of the first part, and Lamm Lumber Co., party of the second part.

Witnesseth, That the party of the first part agrees to sell to party of the second part, upon the terms and conditions hereinafter stated, all the merchantable timber marked for cutting by the proper officer, estimated to be 2,000,000 feet of pine and a small amount of white fir, more or less, on the following described lands, to wit: NE/4 Sec. 30, T 33 S, R. 7 East, within the limits of the Klamath Indian Reservation, situated in the County of Klamath, State of Oregon, the same being lands which have been allotted to John W. Cole, under the provisions of the Act of Feb. 8, 1887.

33 For and in consideration of the foregoing the party of the second part agrees to pay to the Superintendent of the Kla-

math Indian School, Klamath Agency, State of Oregon, the sum of sixty-five hundred and no/100 dollars ($6500.00) more or less, as shall be determined by the actual scale, measurement, or count, for the said timber at the rate of $3.25 per M. for Pine and 50c per M. for white fir for the period ending Mar. 31, 1920. For the 3 year periods of the contract term beginning April 1, 1920, April 1, 1925, April 1, 1926, and April 1, 1929, such prices per M. for each Species as shall be fixed by the Commissioner of Indian Affairs in the manner prescribed in the tribal timber contract dated June 27, 1917.

The party of the second part further undertakes and agrees to pay ten per cent (10%) of the estimated value of the timber sold within thirty days from the date of the approval of this contract by the Commissioner of Indian Affairs, to pay thirty per cent of the said sum before any cutting of timber upon said land, and to pay the total purchase price before any timber is removed from the said land, unless special authority for a different manner of payment is granted by the Commissioner of Indian Affairs.

The party of the second part further undertakes and agrees that they will cut and remove the said timber in strict accordance with the following and all other general regulations which are prescribed by the Department of the Interior as to the sale of timber from Indian lands:

1. The term "Officer in charge" whenever used in these regulations signifies the Superintendent of the Klamath Indian School, or any other officer specially designated by the Commissioner of Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. No timber shall be cut from any areas except those desig-
34 nated by the officer in charge. Unless expressly stipulated to the contrary in the contract, each sale shall include all dead timber, standing or fallen, which is sound enough for lumber of any merchantable grade or for timbers, and all green timber marked or otherwise designated for cutting upon the specified sale area. No living trees except those which are designated for cutting by the officer in charge shall be cut. The title to timber shall not pass to the purchaser until it has been scaled, measured, or counted, stamped by the officer in charge, and paid for. Unless special authority has been granted by the Commissioner of Indian Affairs, no timber shall be removed from the sale area until full payment therefor has been made.

3. Sawmills, camps, chutes, logging railways, and such other improvements as are necessary for conducting lumber operations may be constructed under the supervision of the officer in charge, subject to such conditions as he may prescribe for the protection and improvement of the surrounding forest and for the best interests of the Indians. All merchantable timber used in their construction, and in skidways, bridges, roads, or other improvements, shall be paid for at the contract price. The officer in charge shall reasonable restrict the use of young growth for such purposes.

4. All cutting shall be done with a saw when possible and no unnecessary damage shall be done to young growth and trees left standing. Designated living trees or merchantable dead timber left uncut, timber wasted in tops, stumps, and partially sound logs, trees left lodged in process of felling, standing trees badly injured during the lumbering operations, and any merchantable timber covered by the terms of these regulations and the contract, which is not removed from any part of the cutting area, when logging on that part is completed, or is left on the sale area after the expiration of the contract, shall be scaled and paid for at the contract rate. The officer in charge may require the cutting of living or dead trees or snags, which in his opinion constitute a fire menace. Double scale may be charged for such trees left uncut or for undesignated living trees willfully or negligently cut.

5. Stumps shall not be cut higher than 18 inches, lower when possible, so as to cause the least waste, and all trees shall be utilized to a diameter of 8 inches in the tops when merchantable to that diameter. The log lengths shall be so varied as to make such utilization possible.

6. The approximate minimum diameter limit at a point 4½ feet from the ground to which living trees are to be cut is 18" but trees above these diameters may be reserved for seed or protection, and merchantable trees below these diameters may be marked in the discretion of the officer in charge.

7. Logging operations shall be concentrated as far as possible, and so conducted as to completely log and clean up designated units of the sale area successively as agreed with the officer in charge. Tops shall be lopped and all brush and tops piled compactly at a safe distance from young growth and standing trees at the time of felling, or otherwise disposed of as required by the officer in charge. In the discretion of the officer in charge brush shall be burned by the purchaser under such precautions as to prevent the spread of fire.

8. During the time that any contract remains in force the contractor shall, without charge or expense to the United States or the Indians, do all in his power to prevent and suppress forest fires upon the area covered by the contract or adjacent areas, shall comply with all regulations relative to the maintenance of order on Indian reservations, and shall employ Indian labor in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

9. Timber will be scaled, measured, or counted by officers selected by the Commissioner of Indian Affairs. The cost of the examination, advertisement, marking and scaling of the timber, and the expense of general supervision and protection of the sale area and the adjacent areas from fire by the United States officers shall be paid from the proceeds of the sale of the timber. Timber will be scaled by the Scribner Rule Decimal C, and if required by the officer in charge shall be piled or skidded for convenient scaling. The maximum scaling length of all logs will be 16 feet. Logs over 16 feet in

length will be scaled as two or more logs, in lengths not less than 8 feet when practicable, and with the proper allowance for the increase in diameter at the points of division. Upon all logs three inches additional will be allowed for trimming. Logs overrunning this allowance will be scaled as though two feet longer. Diameters will be measured inside the bark at the small end of the log and recorded at the nearest inch above or below the actual diameter. Proper deductions will be made for defects in logs.

10. Unless extension of time is granted, all timber will be cut and removed on or before and none later than April 1, 1932, and at least will be paid for, cut, and removed on or before _____. The purchaser will be required to cut and remove the timber at such time, in such places, and in such quantities as to prevent, so far as possible, deterioration as a result of fire or windstorm, and will be required to pay the contract rates for any timber which may deteriorate in value through failures to care for the same after a fire or windstorm.

11. No Member of or Delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (see sections 114 and 116, act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," 35 Stat. 1088, 1109), and no person undergoing a sentence of
37 imprisonment at hard labor shall be employed in carrying out any contract (see Executive Order of May 18, 1906). The cutting or removal of timber from Indian lands in breach of the terms of any contract, and without other lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by section 6 of the act of June 25, 1910 (36 Stat. L. 855, 857).

12. Work may be suspended by the officer in charge if the regulations are disregarded, and the violation of any one of the regulations, if persisted in, shall be sufficient cause for the Commissioner of Indian Affairs to revoke a contract and to cancel all permits for other privileges. The decision of the Commissioner shall be final as to the interpretation of any of the foregoing regulations or as to the faithful execution of the terms of any contract.

It is further understood and agreed that this contract shall be void and of no effect until approved by the Commissioner of Indian Affairs.

Signed and sealed in quadruplicate this 24th day of June, 1918.

[CORPORATE SEAL, IF CORPORATION] W. E. LAMM,
Vice-President.

Attest:
ETHEL LAMM, *Secretary.*

Duplicate.

[SEAL] LAMM LUMBER COMPANY,
By: W. E. LAMM, *Vice-Pres.*

[SEAL] JOHN COLE.
Klamath Agency, Oregon.

Witnesses:

A. E. JOHNSON, *Modoc Point, Oregon.*
JOHN HAMILTON, *Klamath Falls, Oregon.*
J. W. BUFORD, *Klamath Agency, Oregon.*
GOMER JONES, *Klamath Agency, Oregon.*

38 The above contract is approved this the 18th day of July, 1919, under the conditions stated therein.

E. B. MERRITT,
Acting Commissioner of Indian Affairs.

STATE OF OREGON,
Klamath County:

This Instrument was rec'd for record on the 17th day of January, A. D. 1921, at 2:30 P. M., and duly recorded in Volume 4, of Miscel. Page 67.

C. R. DE LAP,
County Clerk,
By: GARRETT KLANRIPER,
Deputy.

39 II. *History of proceedings*

On January 20, 1930, the defendant filed a general traverse to plaintiff's petition.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court on June 12, 1934, and, on the same day, the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following on said plea:

ORDER

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December, 1934, that said plea be and the same is overruled without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

III. *Submission of case*

On June 1, 1937, this case submitted on merits, without argument, by Mr. Ralph H. Case, for plaintiff, and by Mr. James J. Sweeney, for defendant.

40 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J.*

Filed January 12, 1938

Mr. Ralph H. Case for plaintiff.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. Lamm Lumber Company, plaintiff, is a corporation organized under the laws of the State of Oregon, with its principal office and place of business at Modoc Point, Oregon.

2. In March 1917, the Assistant Secretary of the Interior advertised for sale about 160,000,000 feet of timber (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir upon about 11,500 acres within township 33 south, range 7 east, on what is designated as Southern Mount Scott Unit, within the Klamath Indian Reservation, Klamath, Oregon.

3. Plaintiff in response to this advertisement bid on the property offered for sale and its bid was accepted. On June 27, 1917, a contract was signed by plaintiff and later approved by the Assistant Secretary of the Interior. The contract stated that it was made by the Superintendent of the Klamath Indian School "for and
41 on behalf of the Klamath Indians, party of the first part," by the terms of which the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." This contract is attached to the petition as Exhibit A and made a part hereof by reference.

Under the contract, the party of the first part agreed to sell to the party of the second part all merchantable dead timber standing or fallen, and all live timber marked or designated for cutting by officers of the Indian Service, estimated to be about 160,000,000 feet board measure, log scale of pine timber (about 95% yellow pine and 5% sugar pine), and about 10,000,000 feet of white fir, located upon an area of about 11,500 acres of land, designated as the Southern Mount Scott Unit within the Klamath Indian Reservation.

Under the contract the party of the second part agreed to pay to the superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the timber to be cut at fixed rates per M feet board measure, Scribner Decimal C scale. The contract prescribed the rates

for specified periods of the contract and with reference to changes in the rates provided:

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed."

Among other things, the contract also provided:

"2. The sale includes an area of approximately 11,500 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows: [Here followed a description of the boundaries as to which there is no dispute in the case.]

"The sale area includes 23 allotments comprising approximately 3,600 acres as to which the purchaser agrees to enter into sep-
42 arate contracts with the Indians who desire to sell and to pay to such Indians 10 per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

"3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twelve million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twelve million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"4. The timber will be paid for in advance payments of not less than $10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than $2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

* * * * * * *

"27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

* * * * * * *

"30. As a further guarantee of a faithful performance of this contract the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of thirty thousand dollars ($30,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder."

43 This bond was furnished and made to the United States in accordance with the above agreement.

4. Pursuant to the provisions of article 2 of the contract of June 27, 1917 (finding 3), plaintiff, on June 24, 1918, entered into a contract with John Cole, father and natural guardian of John W. Cole, minor, an Indian under the jurisdiction of the superintendent of the Klamath Indian School. Under the contract, John Cole agreed to sell to plaintiff all merchantable timber properly marked for cutting, which was estimated to be about 2,000,000 feet of pine, and a small amount of white fir, then situate on the NE¼, Sec. 30, Twp. 33 S., R. 7 E., and within the limits of the Klamath Indian Reservation. The contract further provided that plaintiff should pay to the superintendent of the Klamath Indian School an estimated sum of $6,500 for the period ending March 31, 1920. It also provided that for the three-year periods beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, plaintiff should pay such prices as should be fixed by the Commissioner of Indian Affairs, in the manner prescribed in the contract of June 27, 1917 (finding 3). On July 18, 1918, this contract was approved by the Acting Commissioner of Indian Affairs, and on August 31, 1918, $650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment thereunder. The contract was recorded in Klamath County, Oregon, on January 17, 1921.

5. On March 2, 1919, John W. Cole died. Conformably with the requirements of the Act of June 25, 1910 (36 Stat. 855), and the Regulations of the Department, the Assistant Secretary of the Interior, on August 18, 1920, determined that John Cole, father of the deceased Indian allottee, John W. Cole, was his sole heir. On November 19, 1920, the United States, through the General Land Office, issued to John Cole a fee simple patent covering the land theretofore patented to John W. Cole, deceased. On March 26, 1921, John Cole and his wife deeded the land theretofore patented to him to Luke E. Walker. This deed was recorded in Klamath County, State of Oregon, on March 26, 1921. No question arose between the plaintiff and Luke E. Walker respecting the cutting of timber under

44 the allotment contract of June 24, 1918, until some time in 1925, in which year Walker set up a claim of superior title and right to the timber thereon.

6. In June 1926, Walker commenced suit against the plaintiff in the Circuit Court of Klamath County, Oregon. The petition was in two counts, the first count being based on an allegation that the plaintiff had unlawfully entered upon the NE¼ of Sec. 29, Twp. 33, R. 7 E. W. M., and cut and carried away timber therefrom to the value of $74.83, damaged the premises in the sum of $500, and claimed treble damages by reason of such acts. The petition also set up a claim on account of trespass in establishing and using a logging road over the premises above described for which damages were asked in the sum of $500 in one item and $300 in another. Damages of $500 were also asked because of the manner in which trees were cut upon adjoining premises, allowing tops and debris therefrom to be cast on this property.

In a second count the petition asked damages in the sum of $413.84 for timber and ties cut and carried away from the NE¼ of Sec. 30, Twp. 33 South, R. 7 E. W. M., and $1,000 for the trespass in so doing and claimed treble damages. The second count also set up a claim for constructing a logging railroad over the premises and the trespass in using the same in the sum of $500. The petition likewise contained a general plea for recovery of $1,800 as costs and disbursements in the suit. The total amount of the items of both counts of the petition and the general allegation was $5,588.67, the amount claimed on the second count being somewhat larger than stated in the first.

In its answer to the second count of Walker's suit the plaintiff set out the facts with reference to the contract which had been made with John Cole as hereinabove recited and alleged that a patent was erroneously issued by the defendant to John Cole, father of John W. Cole, and that John Cole gave a deed to Walker for the land described in the contract, to-wit, NE¼ of Sec. 30, Twp. 33, R. 7. Plaintiff further alleged that any rights acquired by Walker were inferior to those which plaintiff had acquired through its con-
45 tract with John Cole and that Walker had knowledge of plaintiff's rights before he received the deed from John Cole for the premises in controversy. The Superintendent of the Klamath Indian Reservation and the Commissioner of Indian Affairs were informed of the commencement of this suit and the progress of litigation therein, but the Government did not appear or take any part in the action.

7. On June 18, 1928, a consent judgment was entered in the Circuit Court of Klamath County, Oregon, against the plaintiff in the sum of $15,000. The judgment recited that it was for the acts alleged and complained of in the complaint in the case and for the removal of timber by the defendant therein cut on the two tracts, namely, NE¼ of Sec. 29, Twp. 33 S., R. 7 E. W. M., and NE¼ of Sec. 30, Twp. 33 S., R. 7 E. W. M.

The judgment entered in the suit begun by Walker was subsequently paid by plaintiff and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title int he proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of $12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

8. Shortly after the entry of judgment referred to in the preceding finding, the plaintiff petitioned the Commissioner of Indian Affairs to reimburse it for the damage and loss sustained by it on account of the act of the United States in issuing to John Cole a fee simple patent to the land covered by the timber contract executed between the plaintiff and John Cole on June 24, 1918, as hereinabove recited. This petition asserted in substance that after the issuance of the patent plaintiff had no alternative than to effect the best settlement possible with Luke E. Walker and it asked to be paid the difference between the sum of $15,000 paid to Walker and whatever amount might be repaid to it by the Commissioner of Indian Affairs.

The Commissioner of Indian Affairs denied this request but advised the plaintiff that it was entitled to the proceeds from the
46 sale of the John Cole allotment timber in the hands of the Superintendent of the Klamath Agency less 8% to reimburse the United States for administrative costs.

On August 27, 1928, the Superintendent of the Klamath Indian Agency refunded to plaintiff $11,189.77 out of the price of the timber cut on the John W. Cole allotment under contract with plaintiff. This did not include the sum of $650 paid as an advance payment by the Lamm Lumber Company and deposited to the credit of the Indian minor, John W. Cole, deceased. The 8% deducted, amounting to $1,029.54, was retained by the United States to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The difference between the sum repaid by the Superintendent of the Klamath Agency to the Lamm Lumber Company, namely, $11,189.77, and the sum of $15,000 paid by the Lamm Lumber Company to Walker in settlement of the judgment was $3,810.23. The plaintiff also incurred additional expenses in the way of an attorney's fee of $1,000 and miscellaneous expense aggregating $63.75 in effecting the compromise settlement of the suit filed against it by Walker. The difference between the sum repaid by the Superintendent to the Lamm Lumber Company and the total of plaintiff's expense as above recited was $4,873.98.

9. The timber contract attached to the petition provided for a set price from its inception up to April 1, 1920, and that for the three-

year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, the price should be such as should be fixed by the Commissioner of Indian Affairs in the manner specified by the contract. (See Finding 3.) Increases were made for the periods beginning April 1, 1920, and April 1, 1923.

On December 22, 1925, plaintiff was advised that its contract provided for readjustment of stumpage prices effective April 1, 1926, and was asked to consent that the date of such price readjustment notice be extended to February 28, 1926. On January 7, 1926, plaintiff replied that this would be satisfactory, but on February 26, 1926, the Commissioner of Indian Affairs directed that the plaintiff be advised that there would be no increase in stumpage prices on April 1, 1926; and on February 26, 1927, the Commissioner
47 notified the plaintiff by telegram that the price of stumpage would not be increased on April 1, 1927. The matter continued to be the subject of correspondence between the parties during 1926 and 1927.

On January 20, 1928, the Commissioner of Indian Affairs wrote a letter to plaintiff in which he reviewed the price increases made effective in 1920 and 1923 and the facts which prompted the Department not to impose a price increase effective April 1, 1926, or April 1, 1927, but stated that on April 1, 1928, price increases which were specified would become effective and plaintiff was asked whether it would voluntarily agree to an increase of 56 cents per M feet in the price of yellow pine from the Southern Mount Scott Unit during the year beginning April 1, 1928, this increase being mentioned as a compromise and less than would be justified by the market.

On January 30, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

"Please wire today whether you accept suggested compromise of 56 cent increased price Klamath timber."

To this plaintiff replied:

"We will not contest proposed increase of price if established by Department. Stop. However, we had expected hearing and would like same delayed until after last year's figures in and after bids received on present advertised unit. Stop. We believe Department idea of values will change."

On January 31, 1928, the Commissioner of Indian Affairs sent another telegram to plaintiff as follows:

"Your telegram thirtieth construed as request for waiver final notice of increased price Southern Mount Scott Unit until April first in order that figures to be presented by you may be considered."

On February 1, 1928, plaintiff wrote the Commissioner of Indian Affairs a letter in which was said:

"In our wire of January 30th we advised that we would not contest an increase in stumpage price up to 56 cents which you suggested, if the Department saw fit to make such increase, but requested that your decision be deferred until after last year's figures and the bids on the newly advertised units were received."

48 It further stated that it understood from the telegram of January 31st that decision would be delayed until April 1st, and suggested that action be deferred until after April 10th, on which date bids would have been received on other units and the price change would then be made as of April 1st. To this letter the Commissioner of Indian Affairs replied on February 9, 1928, stating that it did not appear that bids to be received on other units of the Klamath Reservation should be considered in view of certain facts stated in the letter and that the office would advise plaintiff definitely prior to April 1, 1928, as to the increase to be made under plaintiff's contract.

On March 24, 1928, the Commissioner of Indian Affairs sent the following telegram to plaintiff:

"Decision reached increase price Southern Mount Scott Unit 40 cents effective April 1st. Can hear you as requested your attorney."

On April 1, 1928, plaintiff addressed telegrams to certain Senators in Washington, stating that the Commissioner of Indian Affairs had notified five Klamath operators that a stumpage price increase of 40 cents would be made effective April 1, 1928; that the market was in terrible shape and getting worse; that no rise on any unit was justified, because average for District last year did not show interest on investment; that the action was contrary to the terms of the contracts involved in its case and also in the case of the Algoma Lumber Company, and asked that the Sentaors intercede in behalf of all operators.

On April 2, 1928, a Senator forwarded to the Commissioner of Indian Affairs the telegram protesting the price increase made effective April 1, 1928, and after referring to a conversation with the Commissioner, expressed the hope that he would give careful attention to the matter with a view of preventing excessive stumpage prices.

In letters addressed to the Oregon Senators, on April 3, 1928, the Commissioner of Indian Affairs advised, in substance, that in view of the interest expressed he had again reviewed the matter and regretted to say that he was unable to reverse his conclusions but must adhere to the 40 cent increase.

49 On April 17, 1928, plaintiff sent a letter to the Commissioner of Indian Affairs stating at length the reasons why it considered the recent increase in the price of the timber unjustified and claiming that the Department had no right under the contract to increase the price until April 1, 1929, and should withdraw the in-

crease of 40 cents per M feet. To this letter the Chief of the Forestry Section of the Bureau of Indian Affairs replied in a so-called memorandum dated April 18, 1928, analyzing the facts and statements set forth in plaintiff's letter of April 17, 1928, also stating facts in reply thereto, and asserting that telegrams and letters received from the plaintiff had definitely accepted the Department's suggested compromise of 56 cents [one-half of $1.12 which the Department had declared would not be unreasonable], that later the Department decided to increase the price only 40 cents, and that Mr. Lamm could not now insist on strictly following the wording of the contract.

From April 1, 1928, the date on which the challenged price increase was made effective, to April 30, 1929, the company scaled a total of 30,315,980 feet of pine timber. That quantity of timber at 40 cents a thousand feet board measure totals $12,126.39, which was paid by plaintiff upon demand of the Indian Commissioner.

The defendant introduced in evidence Exhibit R, a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied, together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. It shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding the date of the increase in price, there was a decrease of about $3 per M feet.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $12,126.39.

50 It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of twelve thousand one hundred twenty-six dollars and thirty-nine cents ($12,126.39).

Opinion

GREEN, Judge, delivered the opinion of the court:

In June 1917 the plaintiff executed a written contract for the purchase of timber to be cut by it on the Klamath Indian Reservation. The contract stated that it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians" and that the purchaser agreed to pay the value of the timber to "the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as "party of the first part"

and stated that "the party of the first part agrees to sell to the said Lamm Lumber Company," on the conditions stated, certain timber upon a designated area and that the Lamm Lumber Company "agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians," the value of the timber at prices fixed in the manner prescribed by the contract. This contract, which is set out in full in Exhibit A attached to the petition, is referred to in argument as a "tribal" contract. This tribal contract also specified that the sale area included twenty-three allotments as to which the purchaser agreed to enter into separate contracts with the Indians who desired to sell for the purchase of timber on their allotted lands at prices fixed therefor.

The petition is in two counts. The first count alleges that pursuant to the provisions of the tribal contract plaintiff entered into a contract with John Cole, father of one John W. Cole, a minor, and an Indian under the jurisdiction of the Superintendent of the Klamath Indian school, by which John Cole agreed to sell to the plaintiff the timber upon certain land described in the contract which had been allotted to John W. Cole and plaintiff agreed to pay for said timber to the Superintendent of the Klamath
51 Indian school in a manner set out in the contract; and on August 31, 1918, $650 was paid to the Superintendent of the Klamath Indian Agency as an advance payment under the contract. On March 2, 1919, John W. Cole died, and the Secretary of the Interior, having determined that his father, John Cole, was sole heir, the United States issued in November 1920 to John Cole a fee simple patent for the land upon which the timber was located which had been sold to the plaintiff as above stated. On March 26, 1921, John Cole and his wife deeded this land to Luke E. Walker and in 1925 a controversy arose between Walker and the plaintiff respecting the right to cut timber on the Cole allotment. About June 1926 Walker commenced suit against the plaintiff to restrain the cutting of timber on the land which had been conveyed to him by John Cole and other land, demanding treble damages. Plaintiff filed an answer to the suit begun by Walker asserting superior title, but on June 18, 1928, a compromise having been effected, a consent judgment was entered against plaintiff in the sum of $15,000 in favor of Walker and about the same time as a part of the settlement Walker deeded to plaintiff the realty which had been conveyed to him by John Cole and assigned to plaintiff all his interest and title in the proceeds of the timber upon the Cole allotment paid or to be paid by the plaintiff to the Superintendent of the Klamath Reservation. In the meantime, the Superintendent of the Klamath Reservation had been paid the sum of $12,869.31 for timber cut by plaintiff on the John W. Cole allotment.

After the settlement of the suit begun by Walker, the Superintendent of the Klamath Indian Agency refunded to plaintiff the sum of $11,189.77, but deducted out of the total amount paid by plaintiff for the timber on the Cole allotment $650 paid as an advance payment by the plaintiff and $1,029.54, being 8 per cent of the total amount paid which was retained by the defendant to reimburse it for the expenses incident to administering the contract between the plaintiff and John Cole.

The first count of the petition is based on the allegation that plaintiff paid $15,000 in settlement of the suit brought against
52 it by Walker under the circumstances above described, that it also paid an attorney's fee of $1,000 and miscellaneous expense aggregating $63.75 in effecting the compromise settlement of Walker's suit, making a total of expenditures in connection with its purchase of timber on the Cole allotment of $1,663.75, and it seeks to recover the difference between the sum repaid by the Superintendent and its total amount of expense in connection with the suit by Walker as above recited. This difference is $4,873.98 for which sum plaintiff asks judgment.

When the claim set up in the first count of the petition is analyzed in connection with the facts stated therein, it will be seen that it is in the nature of a suit seeking to recover damages by reason of defendant having issued the patent to John Cole through whom Walker acquired title. The defendant sets up several defenses to this count none of which need to be considered unless the evidence establishes that the plaintiff was in fact damaged as a result of the patent having been issued to Cole in the manner above set forth.

It has already been shown that John Cole and his wife deeded this land to Luke E. Walker and thereafter Walker commenced a suit against the plaintiff seeking treble damages for the timber cut from this tract and another parcel of land and for trespass. In plaintiff's argument this suit seems to be treated as if it related solely to the land specified above, but the fact is that the petition in the suit of Walker v. plaintiff was in two counts and while both counts sought to recover treble damages for timber cut and trespass, the first count pertained to an altogether different tract of land from the parcel involved in this suit, and the cause of action set out therein had no connection whatever with the tract conveyed by patent to John Cole upon which Walker in the second count alleged the Lamm Lumber Company had unlawfully cut timber and trespassed. There was also a general allegation at the close of the petition claiming further damages in the sum of $1,500 independently of the two counts. The total amount of the items of both counts of the petition in the Walker suit and the general allegation was $5,588.67, the amount claimed on the second count being somewhat larger than stated in the first. The Lamm Lumber

53 Company paid $15,000 in settlement of the suit begun by Walker and a consent decree was entered therein on June 18, 1928, reciting that the judgment was rendered for timber cut on the two tracts, describing them separately, and as a determination of all liability of the defendant [Lamm Lumber Company] to the plaintiff [Walker] on account of the various matters recited in the complaint. A few days prior to the payment of the judgment Luke E. Walker deeded to plaintiff the realty theretofore conveyed to Walker by John Cole which was the same realty as was described in the timber contract between John Cole and the plaintiff. This conveyance was made part of the settlement of the suit.

There is no evidence whatever to show how much was paid on the respective counts or that there was any separation thereof in making the settlement. If we were to assume (as we think cannot be properly done) that in the settlement of the case payments were made upon each count in proportion to the amount claimed therein, the amount paid in relation to the timber tract involved will be several thousand dollars less than the sum which plaintiff agreed to pay for the timber thereon. As has been previously shown, the defendant refunded to the Lamm Lumber Company all that it had paid on the timber contract except $1,679.54. If we can reach any conclusion out of this indefinite state of facts, it is that on the transaction as a whole (including the purchase of the timber, the settlement of the Walker case, and the refund of $11,189.77 made by the Government) plaintiff made a profit even when its attorney's fees and expenses are included in the cost of the suit.

It may be contended that plaintiff is entitled to recover the $650 which was not refunded by the defendant on the purchase price of the timber, but we think the transaction with reference to the land in sec. 30, twp. 33 south, range 7 E. W. M., should be considered as a whole in determining whether plaintiff was damaged and that it definitely appears that it was not.

Plaintiff's cause of action on the first count is without merit and will be dismissed.

The action set out in the second count of the petition is begun under the so-called tribal contract. In this count, the plaintiff seeks to recover the amount of an increase prescribed by the Com-
54 missioner of Indian Affairs in the price of timber cut above the original contract price. Plaintiff contends that this increase was wrongful and made in violation of the contract.

The tribal contract provided in substance that any advance in stumpage rates to be paid by plaintiff should not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices were fixed. The defendant introduced in evidence Exhibit R,

a report in 102 pages, giving statistical information of stumpage rates and wholesale prices of lumber at each of the mills in the Klamath District for the years to which their several contracts applied together with other matters bearing thereon, all in detail. This exhibit was compiled by the Assistant Director of Forestry and the Assistant Forester. The increase in controversy was made April 1, 1928. This exhibit shows that instead of there being any increase in the value of lumber at the mills over the average price for the three years preceding, there was an actual decrease of about $3 per M feet. This seems to be virtually conceded by defendant and definitely shows that the Commissioner had no authority to make the increase in the stumpage price by reason of which plaintiff was required to pay in addition $12,126.39. This matter is considered more at length in the opinion rendered this day in the case of Forest Lumber Co. v. United States, No. L–391, where a similar state of facts (a different period being involved) was presented to this court under the same kind of a contract.

Having reached the conclusion stated above, it is unnecessary to consider the other matters which plaintiff claims show that the increase was not made in accordance with the provisions of the contract. The advance in prices not having been authorized by the contract, an implied agreement arose to repay the additional amount collected, unless, as contended by defendant, the contract does not bind the Government in any way and it is not responsible for any act done contrary to the agreements contained therein.

It is urged on behalf of defendant that in making the so-
55 called tribal contract in suit through its officials it was merely acting for the Indians, in their behalf, and for their interest; therefore there was no responsibility on its part for the performance of the contract. In effect the claim is that the defendant, acting through its officials, was merely an agent and that the contract is not a contract of the Government but a contract of the Klamath Indians.

The case is a very peculiar one and we find no authorities directly in point. The contract recited it was made by "the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians," and that the purchaser agreed to pay "the value of the timber to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians." The contract referred to the Klamath Indians as the "party of the first part" which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School "for the use and benefit of the Klamath Tribe of Indians" the value of the timber at prices fixed in the contract. But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act

under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them; it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it. Any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. We think that where one who executes a contract acts solely under his own powers and rights he becomes liable thereon although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for and on behalf of another party does not necessarily make the
56 contract one of the party who acquired the beneficial interest.

We think the words "in behalf of" and "for the benefit of" were used in the contract under consideration for the purpose of showing that the benefits of the contract accrued to the Klamath Indians and not to the United States. Moreover, if the Government was not responsible on the contract, no one was. It is contended that the Government acted in its sovereign capacity in making the contract. This principle applies in certain cases where damages are alleged to result from laws passed by Congress, approved by the President, and then put in force, but we think the principle has no application here. In one sense the Government did act in its sovereign capacity but it is in the same sense that it acts in making any contract which its sovereign powers authorize it to execute. We think the Government can not be heard to deny its responsibility.

It follows from what has been stated above that the plaintiff is entitled to recover on the second count of the petition the amount of overpayment on the contract resulting from the increase prescribed in 1928. Judgment will be rendered accordingly.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

57 V. *Judgment*

At a Court of Claims held at the City of Washington on the 12th day of January, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand one hundred twenty-six dollars and thirty-nine cents ($12,126.39).

VI. *Proceedings after entry of judgment*

On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial.

On March 12, 1938, said motion was allowed by the court.

On April 13, 1938, the defendant filed its motion for a new trial.

On May 2, 1938, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of May, 1938, that the defendant's motion for new trial be and the same is overruled.

58 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1938

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INDEX

CITATIONS

85777—38——1

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALGOMA LUMBER COMPANY, A CORPORATION

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

FORREST LUMBER COMPANY, A CORPORATION

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

LAMM LUMBER COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims in the above-entitled cases.

OPINIONS BELOW

The opinions of the Court of Claims are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered January 12, 1938. Motions for new trials were overruled on May 2, 1938. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether contracts, made pursuant to Section 7 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 406), and the regulations issued thereunder, which provide for the sale of standing timber on unallotted lands of an Indian tribe and which designate the Indians as vendors of the timber, are contracts of the United States, cognizable by the Court of Claims under section 145 of the Judicial Code.

2. Whether contracts for the sale of standing timber on land allotted to individual Indian allottees, made by such allottees pursuant to Section 8 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 407), and regulations issued thereunder, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 15.

STATEMENT

These three cases arose out of the alleged breach of contracts for the sale of timber on certain unallotted and allotted Indian lands in the Klamath Reservation in Oregon. The cases arose at the same time and place and involve the same questions of law. They were considered together and judgments were entered at the same time. The court cited the decision in the Forrest Lumber Company case as the authority for the determination of the Algoma Lumber Company and the Lamm Lumber Company cases. However, the United States has treated the Algoma Lumber Company case as the test case and it contains the most comprehensive findings of fact. Accordingly, in connection with this petition the facts in that case alone will be referred to, and the references to findings of fact will be to those made in the Algoma case, except where the context indicates references to the other cases. A determination of the applicable question of law in any one case will be determinative of the other two cases.

The respondent, the Algoma Lumber Company, pursuant to advertisement and bids, entered into a contract on July 28, 1917, for the purchase of timber from certain designated lands in the Klamath Reservation. The contract was approved by the Secretary of the Interior on September 14, 1917 (Fdg. 5). In addition to providing for the sale of timber from unallotted tribal lands, it also stated

that certain allotted lands were located in the area described and authorized the respondent to contract with the Indian allottees for the purchase of standing timber on such allotted land (Fdg. 5). Thereafter the respondent entered into contracts with the several allottees and those contracts were duly approved by the Secretary of the Interior or the Commissioner of Indian Affairs (Fdg. 21).

The contracts provided that the stumpage rates were to be fixed for three-year periods by the Commissioner of Indian Affairs but that any increase in such rates should "not exceed fifty percent of the increase in the average mill run wholesale net value of lumber * * * during the three years preceding January 1 of the year in which the new prices are fixed" (Fdg. 5).

The court below found in substance that as of April 1, 1928, the Commissioner of Indian Affairs increased the stumpage rate by forty cents per thousand, contrary to the terms of the contract. The respondent duly protested but was compelled to pay, during the years 1928, 1929 and 1930, the additional sum of $25,094.56, which represented the increase in price of forty cents on the stumpage rates for the timber cut by the respondent during those three years.[1]

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[1] In the Forrest Lumber Company case the increased cost as the result of the 40 cents advance in prices between April 1, 1928, and April 1, 1930, amounted to $44,772.62 (Fdg. 17, Forrest case). In the Lamm Lumber Company case the amount of increase stumpage paid between April 1, 1928, and April 30, 1929, amounted to $12,126.39 (Fdg. 20, Lamm case).

The court below also found (Fdg. 21) that the contract for the sale of the timber on the Indian reservation involved herein was authorized by Sections 7 and 8 of the Act of June 25, 1910, and the regulations promulgated by the Secretary of the Interior pursuant to such Act; that the Department of the Government engaged in the administration of Indian Affairs has always treated the Indian forests as private property held in sacred trust by the United States for the Indians; that on some reservations the merchantable stand of timber was practically the only source of revenue from which the cost of social and industrial betterments of the Indian tribe could be met; that the form of contract involved in the instant case has been used in every sale of timber on the Indian reservations since the passage of the Act of June 25, 1910; that prior to the Act of June 25, 1910, contracts for the sale of timber from unallotted lands were substantially similar in form to the present contract so far as relates to the parties thereto; that tribal and allotment contracts were made and administered as if only one contract were involved; but that all contracts for the purchase of timber on allotments held by individual Indians were made with the holders of such allotments and that contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber and by the administrative department concerned to be contracts made for the respective tribal or individual Indians desig-

nated therein and such contracts have been made under the supervision of the Secretary of the Interior and specifically the Commissioner of Indian Affairs for the sole benefit of either the tribe or individual Indians concerned.

The proceeds from the sale of such timber were paid to the Superintendent of the Indian School and the amounts received by him, less 8 per cent deducted and used to defray the cost of administering the contracts and the Indian forests, were deposited either in private state banks or in the Treasury of the United States to the credit of the tribal or individual Indians concerned (Fdg. 23). No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States (Fdg. 24). The proceeds of sale of the timber have always been treated as belonging to the Indians, either tribal or individual, and not as public money of the United States (Fdg. 24).

In April, 1931, the respondent filed suit in the Court of Claims to recover from the United States the amount representing the increase of 40 cents in stumpage rates for the timber cut by the respondent during 1928, 1929 and 1930. On June 12, 1934, the United States filed a plea to the jurisdiction asserting that the Court of Claims lacked jurisdiction to entertain a suit of this character. The plea was overruled and on a hearing on the merits the Court of Claims held that it had jurisdiction to entertain suit and entered judgment for the respondent.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In taking jurisdiction of the instant case.

2. In holding that a contract for the sale of timber on tribal lands executed by the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, and approved by the Assistant Secretary of the Interior wherein the Indian tribe is named as the vendor, is a contract of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

3. In holding that the several contracts entered into by individual Indian allottees for the sale of standing timber and approved by the Secretary of the Interior, are contracts of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

4. In holding that all of the contracts involved in these three cases were contracts of the United States.

5. In failing to find separately the excess costs resulting from the increase of 40 cents per M in respect of the timber cut on allotted land as distinguished from that cut on unallotted land during the years in which such increase was in effect.

6. In entering judgment for the respondent against the United States.

REASONS FOR GRANTING THE WRITS

The court below has decided an important question of Federal law relating to the jurisdiction of the Court of Claims in a way which has never been, but should be, settled by this Court, and which is probably untenable in the light of prior decisions of this Court dealing with the status of the United States with respect to Indian lands.[2]

(1) None of the contracts upon which judgment was entered was a contract with the Government of the United States.

None of the contracts was entered into for or on behalf of the United States. No obligation was specified in any of them which the United States was required by the terms of the contract or by implication to perform, and none which the United States could perform. The United States was not entitled to receive, nor did it receive, the beneficial interest in any of the proceeds of the respondents' performance. The contracts were all made either by or on behalf of the Indians, disposed of the Indians' property and required the respondents to make payments for and on behalf of the Indians. Substantially all of the proceeds were deposited to the credit of the Indians and the balance was applied to defray the expenses of administering their property. Yet the Court of Claims, having observed that the officials who approved these con-

[2] *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Shoshone Tribe*, Oct. Term, 1937, No. 668, decided April 25, 1938.

tracts (and, in the case of the unallotted lands, executed them on behalf of the Indian tribe), were acting under laws of the United States rather than under authority conferred upon them by the Indians,[2] concluded without further analysis that they were not agents of the Indians and consequently that "undoubtedly the contract is a contract of the defendant", the United States. It is submitted that this conclusion is in error, that it disregards the significance of the absolute lack of substantial obligation of the United States or benefit to the United States under these contracts and that it imposes upon the United States a burden which neither the logical nor the practical relation of the United States to these transactions requires.

Since 1871 the United States has discontinued the policy of dealing with the Indians through treaties and has undertaken by direct legislation to aid them in the management of their property.[3]

However, it is clear that while the United States has retained the legal title to unallotted Indian property, nevertheless the Indians have been the sole and complete beneficial owners of such property and the timber on it and the estate which they possess is superior to that of the United States. *United States* v. *Shoshone Tribe, supra.*

The relationship between the United States and the Indians has frequently been described as some-

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[2] *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.

what similar to that of guardian and ward, and the United States has sometimes been referred to as the trustee of the property of which its Indian wards are the beneficial owners. The authority which the United States retains and exercises with respect to Indian property is merely that required for the more convenient discharge of its duty to supervise the management of such property. The court below, although suggesting that the United States acted "somewhat in the manner that a guardian might act for a ward" fails to state any reason for its conclusion from this vaguely expressed analogy that the United States is the contracting party, and, as such, is responsible in damages to repay amounts which not the United States but the contracting Indians received under the contract.

The contract with respect to the unallotted lands recites on its face that it was entered into by the Superintendent of the Indian School of the Klamath Tribe for and on behalf of that tribe and it was executed in like manner. In these circumstances it is apparent that the contract here under discussion was entered into by the Indian tribe pursuant to law and that the contract was the contract of the tribe.[4] It was in no sense a contract

[4] Section 7 of the Act of June 25, 1910, authorized the sale of timber on Indian lands under regulations to be prescribed by the Secretary of the Interior. The contract in the instant case was made pursuant to such law and regulation.

of the United States.[5] It was approved by the Secretary of the Interior but approval by the Secretary does not make him a party to the contract. *Jennings* v. *Wood*, 192 Fed. 507, 508 (C. C. A. 8th).

Nor does the fact that the Commissioner of Indian Affairs was empowered to determine the stumpage price during the life of the contract change its character. Obviously it is permissible for the parties to a contract to designate a third individual to determine the value of the goods delivered under a contract. Such a designation neither makes that person nor his principal a party to the contract and the court below does not appear to rely upon that circumstance to sustain its conclusion.

From the terms, the form, and the substance of the contracts in these cases it is apparent that the Indians themselves were the vendors of the timber and that the Superintendent was acting under the law and regulations as their agent to manage the matter for them. We respectfully submit, therefore, that the contracts are not contracts of the United States, but contracts of the Klamath Indians and that Section 145 of the Judicial Code confers no jurisdiction upon the Court of Claims to entertain a suit of this nature.

The court has failed to notice any distinction between the contracts for the sale of timber from un-

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[5] See unpublished opinion of Assistant Attorney General Cobb, *infra*, pp. 6–17.

allotted lands and those for the sale of timber from allotted lands. Yet they are significantly different. What has been said above applies with a particular force to the contracts made by individual Indians for the sale of timber on allotted lands.

Section 8 of the Act of June 25, 1910, provides that timber on such lands may be sold by the Indian allottees. In these cases the timber on the allotted land was so sold. Even if the contracts with respect to the unallotted lands should be construed as contracts of the United States because the Superintendent in executing them on behalf of the Indians acted under authority conferred by law (which, as far as is apparent, is the sole reason upon which the court below rested its decision), no basis whatever is apparent upon which the contracts made by the Indians themselves, disposing of timber of which they alone, as individuals, were the beneficial owners, could be held to be contracts of the United States. It is true that the Secretary of the Interior was required to approve the contract but this waiver of his power to disapprove the sale is clearly incapable of being construed to be the assumption of the affirmative obligations of a contracting party, whatever the execution of the contracts concerning the unallotted lands might be construed to be. *Jennings* v. *Wood, supra.*

Accordingly, even if the decision of the court below might be sustained as to the contracts for timber from the unallotted lands, it is clearly erroneous

with respect to contracts made by the individual Indians for the sale of timber from allotted lands.*

(2) The question of jurisdiction of the Court of Claims involved in these cases is of great importance.

Thousands of contracts have been made involving the disposition of tribal and individual Indians' property. Such contracts relate not only to timber but also to the exploitation of mineral resources and the use of Indian lands for farming and grazing. Notwithstanding the long period of time during which contracts of this character have been made, this is the first instance, so far as we have been able to determine, in which a suit has been maintained on such a contract under Section 145 of the Judicial Code. If the United States should be held subject under that Act to actions based upon contracts relating to Indian property a vastly increased field of litigation would be opened and the supervision by the United States of the management of Indian property would be seriously affected. There is no provision of law whereby money collected on behalf of the Indians may be either recovered or retained by the Unitd States as reimbursement for any judgment paid by it in such

* The court below failed to find the proper amounts allocable to the allotted and unallotted lands, respectively. Should this Court determine that the court below erred in respect to allotted lands only, the case should be remanded with directions to find the precise amount chargeable to the tribal lands.

a suit. In view of the burden which the maintenance of such actions would throw upon the United States to pay claimants, out of general funds, damages equivalent to amounts already paid to the Indians, it seems obvious that clearer and more explicit language than any in the existing statutes, and stronger reasons than the negative ones stated by the court below, are necessary before such liability should be sustained.

CONCLUSION

The decision of the court below is incorrect and the question involved is of such general importance as to require an authoritative ruling by this Court. Wherefore, it is respectfully submitted that this petition for writs of certiorari should be granted.

N. A. TOWNSEND,
Acting Solicitor General.

AUGUST 1938.

APPENDIX

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, * * *.

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C., Title 25, Sec. 406, 407), provides in part as follows:

> SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.
>
> SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

APR 17 1912

SECRETARY OF THE INTERIOR.

SIR: A letter from the Commissioner of Indian Affairs has been submitted, for opinion as to whether contracts for the sale of timber under authority of section 7 of the act of June 25, 1910 (36 Stat., 855), and the regulations of June 29, 1911, must be filed in the Returns Office of the Department of the Interior as contracts made on behalf of the United States within the purview of section 3744, Revised Statutes. The provisions of said act of June 25, 1910, *supra*, are as follows:

"SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.

"SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienation, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

This office, by opinion of June 13, 1910, advised that contracts for the sale and removal of timber, subject to approval by the Department, are not of the character of contracts required by section 3744, Revised Statutes, to be filed in the Returns Office of the Interior Department. That opinion

had reference to sales of timber under section 8 of said act.

There is no material difference in the character of the contracts, whether the timber is sold under authority of section 7 or section 8 of the act. In the one case, the contract is made by the Secretary of the Interior approving a proposal for purchase of the timber and, in the other case, by a formal contract by the Indian, with the purchaser, approved by the Secretary of the Interior, or by some officer authorized by him. In both cases, however, it is a contract of sale for the sole benefit of the Indian, made under the supervision of the Secretary of the Interior.

While the validity of such contracts depends upon the approval of the Secretary of the Interior, they are solely for the benefit of the Indian and are in no wise contracts made "on behalf of the Government", and are not of the character of contracts which are required by said section 3744, Revised Statutes, to be filed in the Returns Office.

Very respectfully,

(Signed) CHARLES W. COBB,
Assistant Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 245

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALGOMA LUMBER COMPANY, A CORPORATION

No. 246

THE UNITED STATES OF AMERICA, PETITIONER

v.

FOREST LUMBER COMPANY, A CORPORATION

No. 247

THE UNITED STATES OF AMERICA, PETITIONER

v.

LAMM LUMBER COMPANY

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered January 12, 1938. Motions for new trials were overruled on May 2, 1938. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether contracts, made pursuant to Section 7 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 406), and the regulations issued thereunder, which provide for the sale of standing timber on unallotted lands of an Indian tribe and which designate the Indians as vendors of the timber, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

2. Whether contracts for the sale of standing timber on land allotted to individual Indian allottees, made by such allottees pursuant to Section 8 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 407), and regulations issued thereunder, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 36.

STATEMENT

These three cases arose out of an alleged overpayment under contracts for the sale of timber on

certain unallotted and allotted Indian lands in the Klamath Reservation in Oregon. The cases arose at the same time and place, and involve the same questions of law. They were considered together and judgments were entered at the same time. The court cited the decision in the *Forrest Lumber Company* case as the authority for the determination of the *Algoma Lumber Company* case, whereas in the *Lamm Lumber Company* case a separate opinion was rendered employing, with respect to the question involved here, substantially the same language as that used in the Forrest decision. However, the United States has treated the *Algoma Lumber Company* case as the test case, and it contains the most comprehensive findings of fact. Accordingly, in this brief the facts in that case alone will be referred to, and the references to findings of fact will be to those made in the *Algoma* case, except where the context indicates reference to the other cases. A determination of the applicable question of law in any one case will be determinative in the other two cases.

The respondent Algoma Lumber Company, pursuant to advertisement and bids, entered into a contract on July 28, 1917, for the purchase of timber from certain designated lands in the Klamath Reservation. The contract was approved by the Secretary of the Interior on September 14, 1917 (Fdg. 5, R. 11). In addition to providing for the

sale of timber from unallotted tribal lands, it also stated that certain allotted lands were located in the area described, and authorized the respondent to contract with the Indian allottees for the purchase of standing timber on such allotted land (Fdg. 5, R. 13). Thereafter the respondent entered into contracts with the several allottees and those contracts were duly approved by the Secretary of the Interior or the Commissioner of Indian Affairs (Fdg. 21, R. 39-40). Merely as a means of convenient description the contracts relating to timber on the unallotted tribal lands will be referred to in this brief as the tribal contracts.

The contracts provided that the stumpage rates were to be fixed for three-year periods by the Commissioner of Indian Affairs, but that any increase in such rates should "not exceed fifty percent of the increase in the average mill run wholesale net value of lumber * * * during the three years preceding January 1 of the year in which the new prices are fixed" (Fdg. 5, R. 13).

The court below found in substance that as of April 1, 1928, the Commissioner of Indian Affairs increased the stumpage rate by forty cents per thousand, contrary to the terms of the contract. The respondent duly protested, but was compelled to pay, during the years 1928, 1929, and 1930, the additional sum of $25,094.56, which represented the increase in price of forty cents on the stumpage

rates for the timber cut by the respondent during those three years.[1]

The court below also found (Fdg. 21, R. 38–40) that the contracts for the sale of the timber on the Indian reservation involved herein was authorized by Sections 7 and 8 of the Act of June 25, 1910, and the regulations promulgated by the Secretary of the Interior pursuant to such Act; that the Department of the Government engaged in the administration of Indian Affairs has always treated the Indian forests as private property held in sacred trust by the United States for the Indians; that on some reservations the merchantable stand of timber was practically the only source of revenue from which the cost of social and industrial betterments of the Indian tribe could be met; that the form of contract involved in the instant case has been used in every sale of timber on the Indian reservations since the passage of the Act of June 25, 1910; that prior to the Act of June 25, 1910, contracts for the sale of timber from unallotted lands were substantially similar in form to the present contract so far as relates to the parties thereto; that tribal and allotment contracts were made and administered as if only one contract were

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[1] In the *Forest Lumber Company* case the increased cost, as the result of the 40-cent advance in prices between April 1, 1928, and April 1, 1930, amounted to $44,772.62 (Fdg. 17, R. 23, *Fo[illegible]* case). In the *Lamm Lumber Company* case the amount of increased stumpage paid between April 1, 1928, and April 30, 1929, amounted to $12,126.39 (Fdg. 9, R. 30, *Lamm* case).

involved; but that all contracts for the purchase of timber on allotments held by individual Indians were made with the holders of such allotments and that contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber and by the administrative department concerned to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior and specifically the Commissioner of Indian Affairs for the sole benefit of either the tribe or individual Indians concerned.

The proceeds from the sale of such timber were paid to the Superintendent of the Indian School and the amounts received by him, less 8 percent deducted and used to defray the cost of administering the contracts and the Indian forests, were deposited either in private state banks or in the Treasury of the United States to the credit of the tribal or individual Indians concerned (Fdg. 23, R. 41–42). No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States (Fdg. 23, R. 41). The proceeds of sale of the timber have always been treated as belonging to the Indians, either tribal, or individual, and not as public money of the United States (Fdg. 24, R. 42–43).

In April 1931 the respondent filed suit in the Court of Claims to recover from the United States

the amount representing the increase of 40 cents in stumpage rates for the timber cut by the respondent during 1928, 1929, and 1930. On June 12, 1934, the United States filed a plea to the jurisdiction asserting that the Court of Claims lacked jurisdiction to entertain a suit of this character. The plea was overruled and on a hearing on the merits the Court of Claims held that it had jurisdiction to entertain the suit, and entered judgment for the respondent.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In taking jurisdiction of the instant case.

2. In holding that a contract for the sale of timber on tribal lands executed by the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, and approved by the Assistant Secretary of the Interior, wherein the Indian tribe is named as the vendor, is a contract of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

3. In holding that the several contracts entered into by individual Indian allottees for the sale of standing timber and approved by the Secretary of the Interior are contracts of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

4. In holding that all of the contracts involved in these three cases were contracts of the United States.

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5. In failing to find separately the excess costs resulting from the increase of 40 cents per thousand in respect of the timber cut on allotted land as distinguished from that cut on unallotted land during the years in which such increase was in effect.

6. In entering judgment for the respondent against the United States.

SUMMARY OF ARGUMENT

1. The contracts relating to the sale of timber on lands allotted to individual Indians were made by the Indians themselves and were merely approved by Federal officers, who did not become parties to them. Such contracts related clearly to property of the individual allottees, not property of the United States, and were in no sense contracts of the United States. Consequently, the Court of Claims had no jurisdiction to entertain suits based upon them.

Moreover, the tribal contracts, executed by the Superintendent of the Klamath Indian School on behalf of the tribe, expressly disavowed intention to sell under such contracts timber from allotted lands. Consequently, the United States had no liability under the tribal contracts with respect to timber taken from the allotted lands.

The Court of Claims having failed to distinguish the amounts recoverable for timber taken from allotted lands and for that taken from unallotted lands, these cases should be remanded to the Court of Claims to find such amounts separately, if it

should be held that the tribal contracts alone are contracts of the United States.

2. The contracts relating to timber from tribal lands are contracts of the Klamath Indians, not contracts of the United States. They provide for disposition of Indian property, rather than property of the United States. The United States was not beneficially interested in its own right in the proceeds of their performance and if a party to them at all, was a party only in a representative capacity.

The Superintendent of the Klamath Indian Reservation was the agent designated by law to act for the Indians in the sale of timber on tribal lands and, acting as such agent, he executed the tribal contracts, as the contracts expressly recite, on behalf of the Indians, not on behalf of the United States.

If, however, the United States was a party to these contracts, it was a party in a peculiar representative capacity which does not involve affirmative personal responsibility such as might fall upon a trustee or guardian acting on behalf of private persons. Furthermore, none of the provisions made or steps taken in these transactions to protect the Indians in the realization of income from the sale of their property gave rise to any affirmative liability of the United States.

3. The Court of Claims has no jurisdiction under Section 145 of the Judicial Code to entertain suits against the United States in such representative

capacity as it may have had in these transactions. Previous decisions of this Court and of the Court of Claims indicate that the United States is not a proper party to a suit against an Indian tribe even where it has been designated as trustee for the Indians. They indicate further that the Court of Claims has no jurisdiction to entertain a suit against the United States where, as in this case, the moneys in question are held by public officers of the United States for specific purposes and are not public moneys of the United States available to pay any judgment rendered. Section 145 of the Judicial Code, being an Act waiving the sovereign immunity of the United States, is to be strictly construed. The burden is upon the respondents to sustain the jurisdiction by showing that these contracts are contracts of the United States within the meaning of that provision. That requirement is particularly applicable in this case where the substantial ultimate effect of the judgment is likely to be to permit recovery to be realized out of Indian funds without Congress having had the opportunity, which normally it has in such cases before suit is begun, to consider the equities of the claim and ascertain the propriety of waiving the sovereign immunity to suit. We believe that under existing statutory provisions the respondents' remedy is to seek from Congress special authorization to proceed to recover the amount to which they claim they are entitled from the Indian funds which have been enhanced by the alleged breach.

ARGUMENT

Section 145 of the Judicial Code provides that the Court of Claims shall have jurisdiction over claims founded upon any contract, express or implied, with the Government of the United States. It is under that provision that the jurisdiction of the Court of Claims is asserted in these cases. It is our position that neither the contracts for the sale of timber from allotted lands nor the tribal contracts for the sale of timber from unallotted lands are contracts with the Government of the United States within the meaning of that provision.

I

THE CONTRACTS MADE BY INDIVIDUAL INDIANS FOR THE SALE OF TIMBER UPON THEIR ALLOTMENTS ARE CONTRACTS OF THE INDIVIDUAL ALLOTTEES, NOT CONTRACTS OF THE UNITED STATES

The contracts involved in these cases relate to the sale of timber on defined areas of land within the Klamath reservation. In each instance the area was specified in the contract. There were lands in each area which were no longer tribal lands but which had been allotted to individual Indians. The tribal contract first executed in each case was made by the Superintendent of the Klamath Indian School acting, according to the terms of the contract, "for and on behalf of the Klamath Indians" (R. 6). These tribal contracts did not purport to sell any timber from the allotted

lands but merely authorized the respondents to make separate contracts with the individual allottees for the purchase of timber on allotments located within the sales area. This was in consonance with Section 8 of the Act of June 25, 1910, *infra*, p. 36, which authorized the allottees themselves to enter into contracts for the sale of standing timber, subject to the approval of the Secretary of the Interior.[2]

A typical allotment contract is set forth in the *Lamm Lumber Company* case, No. 247 (R. 18–22). It is apparent that such contracts are not contracts of the United States. They are contracts made by the individual Indians for the sale of timber which belonged to them as allottees of specific tracts of land. In them the allottees, in their own right, undertake to sell the timber upon their allotments, having been authorized to do so by Section 8 of the Act of 1910 (*supra*). They could sell or not as they chose. That Act had made the individual allottee the sole judge of whether he wished to sell, and the contracts entered into on behalf of the tribe with respect to unallotted lands did not undertake to commit any allottee to a sale.

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[2] The Indian allottees held their land under patents issued under Section 5 of the Act of February 8, 1887, c. 119, 24 Stat. 388, 389–390 (U. S. C., Title 25, Sec. 348). That section provided that any conveyance of the lands allotted during the trust period or any contract made with reference to such lands should be absolutely null and void. However, Section 8 of the Act of June 25, 1910, had removed this restriction and permitted the allottee to make a valid contract for the sale of the timber.

The required approval of the allottee's contracts by the Secretary of the Interior does not make them contracts of the United States. The sole purpose of requiring the Secretary's approval is to prevent improvident alienation or leasing by restricted allottees. The Secretary's power is a mere veto power, a power to disapprove the sale. He has no authority to alien or lease the property in the allottee's stead. *Mott* v. *United States*, 283 U. S. 747. Accordingly, his approval noted on these contracts is no more than a memorandum that he did not exercise, in these instances, his purely negative power to disapprove. It does not make the Secretary a party to the contract in any sense. *Jennings* v. *Wood*, 192 Fed. 507, 508 (C. C. A. 8th).

It is apparent, therefore, that no one but the allottee had a right to contract to sell the timber on the allotted lands; that in these cases no one but the allottees did contract to sell timber on such lands (No. 245, R. 39); that the contracts made by the allottees were in no sense contracts of the United States, and, consequently, that the Court of Claims was without jurisdiction to entertain suits based upon them.

Nor can the judgments against the United States with respect to timber sold from allotted lands be sustained as based upon the contracts made by the Superintendent on behalf of the tribe. Even if

those contracts should be considered to be contracts of the United States, they expressly disavowed any intention of selling timber on any allotted lands, and the United States could not be liable solely because it had authorized the respondents to make separate contracts for the purchase of such timber.[8]

II

THE CONTRACTS RELATING TO TIMBER FROM TRIBAL LANDS ARE CONTRACTS OF THE KLAMATH INDIANS, NOT CONTRACTS OF THE UNITED STATES

The court below reached the conclusion that the tribal contracts were entered into by the Superintendent, not as agent for the Indians but as a representative of the United States, which the court below considered to be acting "somewhat in the manner that a guardian might act for a ward." Accordingly the court held that the tribal contracts were contracts of the United States, and conse-

[8] In Nos. 245 and 246 the petitioners, in their brief in opposition (pp. 4–5) admit that the judgments rendered included the allegedly excessive amount charged for timber on both allotted and unallotted lands. The same is true of the judgment in No. 247 in which no brief in opposition was filed. If this Court should conclude that these contracts made by allottees with respect to timber from allotted lands are not contracts of the United States but that the tribal contracts, on the contrary, are contracts of the United States, cognizable by the Court of Claims, the cases should be remanded to that court with instructions to limit the judgments against the United States to any excess charged for timber under the tribal contracts.

quently that it had jurisdiction under Section 145 of the Judicial Code to entertain claims based upon them. We submit that that holding is erroneous, and that it does not accurately reflect either the true character of the relationship between the United States and the Indians or the true character of the title of tribal Indians to timber lands upon which they reside. Moreover, it fails properly to construe the jurisdiction which Section 145 of the Judicial Code conferred upon the court below.

A. THE CONTRACTS DID NOT RELATE TO PROPERTY OF THE UNITED STATES, AND WERE NOT FOR THE BENEFIT OF THE UNITED STATES

Title to the timber involved in the tribal contracts was in the Klamath Indians. The Klamath Indians have held the land upon which the timber was located from time immemorial.[4] By a treaty dated October 14, 1864, they had ceded the major portion of their original holdings to the United States, but the present portion was retained to be occupied by the tribe as an Indian reservation. *United States* v. *Klamath Indians*, 304 U. S. 119, 121, 122; see 32 L. D. 664, 666. The title which the Indians hold has been described as the right to the beneficial use and possession of the area they occupy. Conversely, the title which the United States holds has been held to be merely the exclusive right

[4] House Misc. Documents, 51st Cong., 1st Sess., Vol. 44, No. 272, Part 1.

to purchase the land from the Indians if the Indians are willing to sell, for a price which the Indians are willing to accept. *Worcester* v. *Georgia*, 6 Pet. 515, 580; *Holden* v. *Joy*, 17 Wall. 211, 244; *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S. 733, 742–743. The kind of title which treaty Indians have in a reservation is the same as that which the original Indian occupants had, subject, of course, to conditions imposed by the treaty. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117. Accordingly, this Court has held that the Indians' title is as valuable as a full title in fee, and that, in effect, the tribe owns the land, together with all minerals, and timber located upon it. Such ownership is said to be reflected by the construction which the United States and the Indians have placed upon their title. In the *Shoshone* case, this Court said (pp. 117–118):

> Provision in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them.

From the principles set down in the *Shoshone* case, it would seem to follow that title to the timber on the Klamath reservation was in the Indians and that the tribal contracts were contracts for the sale of Indian property, not property of the United States.

Furthermore, the United States was not beneficially interested in the contracts. The tribal contracts recite that they were entered into between the Superintendent of the Klamath Indian School "for and on behalf of the Klamath Indians, party of the first part," and the respondent. None of them purports to have been entered into on behalf of the United States. No obligation was specified in any of them which the United States was required by the terms of the contracts, or by implication, to perform, and none which the United States could perform. The United States was not entitled to receive, nor did it receive, the beneficial interest in any of the proceeds of the respondent's performance. The contracts were made on behalf of the Indians, disposed of the Indians' property, and required the respondents to make payments to the Superintendent of the Klamath Indian School for and on behalf of the Indians. All of the proceeds were deposited to the credit of the Indians, except a sum retained to defray the expenses of administering their property, particularly the expenses incident to the timber cutting operation.

These circumstances indicate that these tribal contracts were not contracts for the sale of property of the United States and that they were not made for the benefit of the United States. If the United States was a party to them at all, it was merely in a representative capacity. The character and direction of the responsibility of the officers who acted in these cases is therefore the essential factor to be ascertained. The court below said that in executing the contracts the Superintendent was not acting as agent of the Indians and said further that the United States acted in this transaction "somewhat in the manner that a guardian might act for a ward." The United States has also been referred to as the "trustee" of the property of the Indians. However, the effective incidents of the relation of the United States to the Indians have not been worked out, and on the whole cannot be worked out fairly or precisely by reliance upon merely descriptive, convenient references, such as these, to categories and formulae of general law. They must be evolved through careful analysis of the characteristics and requirements of particular situations. We believe that the relation of the United States and its officers to the Indians and their property in this case has qualities and incidents which distinguish it in significant particulars from the usual fiduciary relationships between private persons and that the rights and responsibilities which arise out of it can be determined correctly only through consider-

ation of its peculiar characteristics as a unique and distinctive relationship.[5] Accordingly we shall not attempt to fit it precisely into one or another of the established general categories, but rather shall point out those factors involved in the situation which we believe to be significant in reaching a correct practical result in these cases. We believe that the balance of these factors points to the conclusion that these are not contracts of the United States within the meaning of the Act conferring jurisdiction upon the Court of Claims and that the court below, in treating them as contracts of the United States, has achieved a result inconsistent with the intention of the statute and inimical to the fair and effective fulfillment by the United States of its duties with respect to the Indians' property.

B. THE SUPERINTENDENT REPRESENTED THE INDIANS IN EXECUTING THE CONTRACTS

The salary of the Superintendent of the Indian School of the Klamath reservation is paid out of the tribal funds.[6] He has general supervision over

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[5] Cf. *Rustomjee* v. *The Queen* (1876), 1 Q. B. L. R. 487.

[6] We are informed by the officials of the Office of the Commissioner of Indian Affairs that this statement is true with reference to the Klamath Indians. The findings of the court below fail to discuss this fact. It is reflected in the appropriation bills for the Department of the Interior, which do not appear to make any other provision for the pay of the Superintendent. See c. 86, 40 Stat. 561, 584–585; c. 199, 42 Stat. 552, 576; c. 42, 42 Stat. 1174, 1197. We call this to the attention of the Court merely to apprise the Court, as fully as possible, of all the significant facts.

and management of the Indians' affairs. He has been said to act as their "agent and guardian" *United States* v. *Sinnott*, 26 Fed. 84, 86 (C. C. D. Ore.). By regulations,[1] he is designated as their agent for the purpose of selling their timber. Cf. *Parks* v. *Ross*, 11 How. 362. He executed these contracts expressly "for and on behalf of the Klamath Indians" (R. 6).

This is consistent with the manner in which sales of the Indians' timber have long been regarded. Before the passage of the Act of June 25, 1910, sales of timber on Indian reservations were considered as made by the Indians. They, not the United States, were the vendors of the timber. *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 295. Nothing in that Act changed their relationship to such sales in this fundamental respect. The court below found specifically that: "Contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber, and by the administrative department concerned, to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior, and specifically the Commissioner of Indian Affairs, for the sole benefit

[1] Sections 8–11 of Regulations and Instructions for Officers in Charge of Forests on Indian Reservations, approved June 29, 1911, as modified March 11, 1917.

of either the tribe or individual Indians concerned" (R. 40).

The departmental practice has been always to consider such contracts as contracts of the Indians. They are not filed in the Returns Office of the Department of the Interior, as they would be if they were considered to be contracts of the United States. See unpublished opinion of Assistant Attorney General Cobb, *infra*, p. 37.

It is true, as the court below pointed out, that the element of consent, typical of an ordinary agency, was lacking. But it is not unusual for a person to be designated by law as the agent of another for particular purposes, without the consent of the latter, or even against his will. See *Doherty & Co.* v. *Goodman*, 294 U. S. 623, 628. The representative character thus established is fully effective for the limited purposes for which it is created, but it has never been imagined, merely because it had been created by law rather than by designation of the principal, that it is a trusteeship or a guardianship. The mere circumstance that the duty of the Superintendent to act for the Indians is created by law rather than by designation of the Indians clearly does not make it impossible to consider him as acting as their representative in the limited way in which an agent acts rather than as the representative of a trustee or guardian. This circumstance is not in itself sufficient to make the United States a party to these contracts, responsible in damages for a breach.

C. THE UNITED STATES HAS NOT ASSUMED OBLIGATIONS AS GUARDIAN, AS TRUSTEE, OR OTHERWISE, UNDER THE CONTRACTS

Even if the Court should conclude that the Superintendent was acting as a representative of the United States in making the contracts, it does not follow that the United States assumed personal responsibility in connection with their performance. The view that the Superintendent was acting solely as an officer of the United States is not at all inconsistent with the conclusion that the United States in turn was acting in a capacity which did not involve a personal responsibility as trustee or guardian. Even if it should be held that the United States was a party to these contracts as manager of the Indian's property, it is apparent that the capacity in which it acts has no exact analogy in general fields of law. Accordingly no obligation, not clearly undertaken by the United States under these contracts, may properly be imposed upon it merely because such an obligation would be an incident of some fiduciary relationship to which the situation of the United States in these cases has only a specious similarity.

(1) The United States did not contract as a trustee

These contracts were not made by the United States as a typical trustee. A trustee holds title to the trust property. It seems clear from the *Shoshone* case that the United States did not have

title to the timber sold in these cases. In the *Shoshone* case this Court said (304 U. S. at 117):

> The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Furthermore, the United States does not possess the right which a trustee ordinarily has to reimburse itself out of the trust estate. It seems clear that the United States cannot, as a matter of course, pay the judgments or reimburse itself for this payment out of available tribal funds. The Indians' moneys are not public moneys of the United States. *United States* v. *Brindle,* 110 U. S. 688, 693; *Quick Bear* v. *Leupp,* 210 U. S. 50, 77.

Not only does this practical bar to direct reimbursement from the trust estate further distinguish the situation of the United States in these cases from that of a trustee but also, unless effective methods of circumventing it can be devised and made effective, it will result in the Indians receiving a windfall as a result of the phase of the transaction in question here, while the respondents are paid out of general funds of the United States. That result would obviously be anomalous and inconsistent with the trustee analogy. As will be

pointed out later in this brief, it is not necessary to a fair result.

It may be contended that the United States might readily achieve reimbursement, substantially out of the Indian funds, by any of numerous methods, such as appropriating for general use Indian funds equivalent to the judgments paid, or reducing, by a sum equivalent to the judgments, appropriations which in the future might be made for the welfare of these Indians. Such an argument merely emphasizes the inappropriateness of the trustee analogy. Furthermore, it makes it clear that these are suits substantially against the Indians on claims arising under contracts which are substantially Indian contracts, not suits against the United States within the meaning of Section 145 of the Judicial Code. Moreover, it makes it apparent that the assumption of jurisdiction in suits of this kind presages results directly contrary in substance to the settled legislative policy of permitting suits against the Indian tribes only under special Acts, enacted after Congress has had opportunity to consider whether the equities of the claim require, in fairness, that the immunity be relinquished, and to prescribe the terms under which the claim may be asserted. *Thebo* v. *Choctaw Tribe*, 66 Fed. 372, 375–376 (C. C. A. 8th); *Adams* v. *Murphy*, 165 Fed. 304, 308–309 (C. C. A. 8th).

These considerations make it evident that the trustee analogy does not fit these cases.

(2) The United States is not liable as guardian

The language most frequently used in describing the relationship between the United States and the Indians is that of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, where he said that it somewhat resembles that of guardian and ward. But clearly the expression was not used, and was not intended to be used, as precisely definitive or as suggesting that the United States is liable on Indian contracts as a guardian is liable. See *Choctaw & Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.

A contract by a guardian on behalf of his ward, relating to real property, must ordinarily be approved by an appropriate court. No judicial approval is required, either by statute or by regulations in respect of contracts for the sale of Indians' timber.

Like a trustee a guardian, having satisfied a judgment against him in his capacity as guardian, may reimburse himself from assets available in his ward's estate. The United States has no such right here, as we have pointed out above, and such means as it might adopt to achieve reimbursement are inimical to the preservation of its established policies towards the Indians. Moreover the United States has not purported to assume liabilities as a guardian. None are to be implied from an inapplicable analogy.

(3) No liability of the United States is to be implied from the provisions of the bonds given by the respondents

It will undoubtedly be urged, as it has been urged heretofore, that the fact that the obligation of the bonds ran to the United States, discloses clearly that the United States was the principal party to the contracts. But the mere fact that the United States possesses a right against third persons in respect of contracts which the latter have entered into with Indian tribes does not inevitably create reciprocal rights in such persons against the United States. A brief consideration of the relationship between the United States and the Indians discloses the error of this contention. The United States has assumed great obligations to the Indians. For generations it has undertaken to manage their affairs, to educate and civilize them, to protect them against their white neighbors, and generally to promote their welfare. It has consistently appropriated large sums of money to make these purposes effective. Necessarily, in carrying out these obligations, it has a right and a duty to assure the most complete accomplishment of the intended results. If, as here, a contract is entered into for the disposition of Indian property, it is proper that the United States should enable itself or its officers, as representatives of the Indians, to enforce, directly and conveniently, performance of the contracts by the persons obligated under them

to the Indians. Obligations of this character are enforced by the United States notwithstanding the fact that the United States may not be a party to the contract. *U. S. Fidelity Co.* v. *Bramwell,* 295 Fed. 331, 333; 299 Fed. 705; 269 U. S. 243; *United States* v. *Pumphrey,* 11 App. (D. C.) 44. It is to be noted, in this connection, that in the transactions involved in these cases the Superintendent was to receive the money paid under the contracts and to deposit it for the account of the Indians. Liability to the United States on the bond is consistent especially with the convenient administration of this provision. The existence of such liability has no more tendency to show that the United States is the responsible principal than the fact that the Superintendent was to receive the money paid in performance of the contract and to deposit it for the Indians. The designation of an agent to receive the proceeds of a sale is common practice. The designation of the same agent to receive any indemnity paid in case of non-performance is not substantially different. It provides no adequate basis for concluding that the agent is not an agent at all but a trustee or a guardian, or, in this case, that the United States is in any way obligated under the contract to pay damages for a breach.

We respectfully submit, therefore, that the lack of any substantial undertaking by the United

States under these contracts makes it clear that they are not contracts of the United States in its own right, and that it has undertaken no responsibility as representative of the Indians for their performance or to repay excessive amounts paid under them to the Indians' account. We submit further that none of the provisions made or steps taken to assure protection of the Indians' interests and their realization of the full benefits of performance is inconsistent with either the express recital of the contracts that they were executed by the Superintendent for and on behalf of the Klamath Indians, or the view that the Klamath Indians are the principal contracting parties and not the United States.

We respectfully submit that if the United States is to be held to be a party to these contracts responsible in damages in these cases, its responsibilities must rest not upon the analogy of trusteeship, or guardianship, nor upon any provisions of these contracts, but rather upon some aspect of the peculiar circumstances in which the United States, by virtue of its sovereignty and by reason of the necessities of the situation, must manage and supervise the affairs of the Indians. We believe that those circumstances and the legislative policy followed with respect to them make it evident that the United States is not intended by Congress to be, and should not be, subject to suit on these contracts in the Court of Claims.

III

THE COURT OF CLAIMS HAS NO JURISDICTION UNDER SECTION 145 OF THE JUDICIAL CODE TO ENTERTAIN SUITS ON THE TRIBAL CONTRACTS EVEN IF THE UNITED STATES BE DEEMED A PARTY TO THE CONTRACTS IN A REPRESENTATIVE CAPACITY

The Court of Claims has general jurisdiction only of suits in which the United States is a defendant and in which a money judgment may be entered against it. It is obvious that if these contracts are contracts of the Indian tribe, the court is without jurisdiction.

The respondents have contended heretofore that the United States holds the timber in trust for the Indians, and that the contracts, even though not made by the United States in its own name, must be construed to be contracts of the United States acting as a trustee to make the sale. We submit that, even if this Court should conclude that the United States was a party to these contracts in a representative capacity, nevertheless the Court of Claims has no jurisdiction under Section 145 of the Judicial Code to entertain a suit against the United States in such representative capacity as it may have had here.

While this Court, as far as we have been able to discover, has never passed expressly upon the precise question presented here, it has held, in *Green v. Menominee Tribe*, 233 U. S. 558, that the United States might not be joined as a party defendant in

a suit against an Indian tribe for what was held to be a breach of contract on the part of the Indian agent. In *Oregon* v. *Hitchcock*, 202 U. S. 60, 70, it has held that there is no Act of Congress assuming on behalf of the United States full responsibility in behalf of its wards, the Klamath Indians, for the result of any suit affecting their rights in these lands. In *Turner* v. *United States*, 248 U. S. 354, it expressly held that the United States might not be joined in a suit against the Creek Indians, even though in that case the United States had been designated as the trustee for the Indians. In *In re Sanborn*, 148 U. S. 222, 227, this Court stated that enactments intended to protect the Indians from improvident and unconscionable contracts by no means created a legal obligation on the part of the United States to see that the Indians perform their part of such contracts. Cf. *Bonner* v. *United States*, 9 Wall. 156, 160. We believe that the decision of the court below in *Leka, Admx.* v. *United States*, 69 C. Cls. 79, states the principle which should govern the question here presented. There suit was instituted against the United States to recover certain postal savings deposits. The deposits, according to law, were held by a board of trustees consisting of public officials of the United States. The Court of Claims held that it was without jurisdiction to entertain such a suit, as it was not a suit against the United States within the meaning of Section 145 of the Judicial Code, and furthermore, because the Secretary of the Treasury

had no fund out of which to pay the judgment should it be rendered. The same is true in the instant case. The funds of the Indians derived from the sale of the timber are private funds, and not public moneys of the United States. *United States* v. *Brindle*, 110 U. S. 688, 693; *Quick Bear* v. *Leupp*, 210 U. S. 50, 77.

It is, of course, settled law that Acts waiving sovereign immunity to suit are to be strictly construed. The persons asserting that the Act waiving immunity covers the suit in question must sustain the burden of proving jurisdiction. *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *United States* v. *Edmondston*, 181 U. S. 500, 504; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 359. We submit that the respondents have failed to meet this burden; that even though these be held to be contracts entered into by the United States, nevertheless they would be contracts of the United States made not for itself but as trustee or guardian or in some other representative capacity and that the Court of Claims has no jurisdiction over suits on such contracts.

The Tucker Act, which was the precursor of Section 145 of the Judicial Code, eliminated claims of Indians against the United States from the jurisdiction of the Court of Claims. It seems unlikely that Congress should have intended at the same time to make the United States liable on contracts in which it had no beneficial interest, which were

entered into solely in the course of its management of the Indians' affairs and which, if judgment is rendered against the United States, would raise questions concerning rights between the United States and the Indians. To the limited extent to which the legislative history is helpful it suggests that such claims as we believe these to be were not intended to be covered by the jurisdiction conferred.* An intent on the part of the Congress to place such a burden upon the Court of Claims is not lightly to be presumed. *United States* v. *Edmondston, supra.*

This is particularly evident in a case such as this where the effect of recognizing jurisdiction would be to open the way to suits the ultimate effect of which (unless the United States has no means, direct or indirect, for reimbursing itself out of Indian funds) would be substantially the same as permitting suits against the Indian tribes in the Court of Claims. As we have pointed out above (*supra*, p. 24), it is not impossible that the United States might reappropriate or withhold sufficient funds which otherwise would be applied for the welfare of the Indians to reimburse itself for the amounts paid out of its general funds under judgments such

* Mr. Tucker, in reporting his bill to the House from a conference, stated—"There was a proposition, I will explain to my friend, at one time in the course of this discussion to introduce claims for captured and abandoned property, for cotton claims, for swamp lands, for Indian claims, and we just said, do not load down a good bill with controverted questions, and defeat the whole." Cong. Rec., Vol. 18, Part 3, p. 2678.

as those in these cases. However, such a practice would be haphazard and indirect and would be likely to lead to misunderstanding by the Indians and possible suspicion of abuse. Furthermore, it does not appear to be necessary in order that persons who contract to buy Indian property, as respondents have done here, may have a fair and effective means of recovering whatever may be due them. The established policy of Congress has been to require persons having claims against the Indians to proceed under special Acts authorizing suit and defining the jurisdiction of the appropriate court for the particular case. That remedy seems especially appropriate here. It is evident from the findings that there is considerable question whether concessions made in the early years of the contract period by the officers representing the Indians in connection with these contracts had not given to the respondents advantages to which they were not entitled under the contract, and whether the alleged overcharge in question here was not merely the result of the Superintendent's effort to recover for the Indians a part of the amount to which they were entitled under the contracts, and which they had failed to realize. The court below indicated that whatever the equities might be with respect to offsetting previous concessions, it was not in a position to consider them in this suit. It would seem to be more consistent with the effective exercise by the United States of its sovereign power to protect the Indians in their

dealings to require, as we believe existing law does require, that claims such as this be submitted first to Congress, which will be in a position, as the Court of Claims is not, to consider all the equities of the entire case and provide for suit under such conditions as will permit the court to consider the whole situation. We see no basis for extending the general jurisdiction of the Court of Claims by a strained construction to include suits such as this, not clearly contemplated by the Act conferring its general jurisdiction, where the possibility of a result substantially nullifying the consistent policy of Congress with respect to claims against the Indians is as apparent as it is here, and where the alternative result leaves the Indians with a windfall and the United States liable on a contract in which it is not beneficially interested.

We submit that in a case of this character, as in the case of other suits against the Indian tribes, the respondents are required, under existing statutory provisions, to seek their remedy first through Congress, setting forth the equities of their claim and leaving it to Congress to decide whether in all the circumstances the immunity should be waived and jurisdiction conferred upon a court to entertain the suit, and to denominate whom the defendant should be, whether it should be the United States, which received no benefit from the contracts, or the Klamath tribe, which was the beneficiary of any error in the decision of the Commissioner of Indian Affairs.

CONCLUSION

We submit that the court below lacked jurisdiction to entertain these suits, and in any event that it lacked jurisdiction of those parts of the suits based upon contracts entered into with Indians holding allotments. The judgment of the court below, therefore, should be reversed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAM E. WHITAKER,
Assistant Attorney General.

PAUL A. SWEENEY,
Special Assistant to the Attorney General.

JAMES J. SWEENEY,
Attorney.

NOVEMBER 1938.

APPENDIX

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, * * *.

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C., Title 25, Secs. 406, 407), provides in part as follows:

> SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.
>
> SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

APR. 17, 1912.

SECRETARY OF THE INTERIOR.

SIR: A letter from the Commissioner of Indian Affairs has been submitted, for opinion as to whether contracts for the sale of timber under authority of section 7 of the act of June 25, 1910 (36 Stat. 855), and the regulations of June 29, 1911, must be filed in the Returns Office of the Department of the Interior as contracts made on behalf of the United States within the purview of section 3744, Revised Statutes. The provisions of said act of June 25, 1910, *supra,* are as follows:

"SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.

"SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienation, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

This office, by opinion of June 13, 1910, advised that contracts for the sale and removal of timber, subject to approval by the Department, are not of the character of contracts required by section 3744, Revised Statutes, to be filed in the Returns Office of the Interior Department. That opinion had

reference to sales of timber under section 8 of said act.

There is no material difference in the character of the contracts, whether the timber is sold under authority of section 7 or section 8 of the act. In the one case, the contract is made by the Secretary of the Interior approving a proposal for purchase of the timber and, in the other case, by a formal contract by the Indian, with the purchaser, approved by the Secretary of the Interior, or by some officer authorized by him. In both cases, however, it is a contract of sale for the sole benefit of the Indian, made under the supervision of the Secretary of the Interior.

While the validity of such contracts depends upon the approval of the Secretary of the Interior, they are solely for the benefit of the Indian and are in no wise contracts made "on behalf of the Government", and are not of the character of contracts which are required by said section 3744, Revised Statutes, to be filed in the Returns Office.

Very respectfully,

(Signed) CHARLES W. COBB,
Assistant Attorney General.

U. S. GOVERNMENT PRINTING OFFICE, 1910

Supreme Court of the United States

OCTOBER TERM, 1938.

Nos. 245-246.

THE UNITED STATES OF AMERICA, PETITIONER,

VS.

ALGOMA LUMBER COMPANY, A CORPORATION, RESPONDENT.

THE UNITED STATES OF AMERICA, PETITIONER,

VS.

FOREST LUMBER COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

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THE UNITED STATES OF AMERICA, PETITIONER,

VS.

ALGOMA LUMBER COMPANY, A CORPORATION, RESPONDENT.

THE UNITED STATES OF AMERICA, PETITIONER,

VS.

FOREST LUMBER COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT.

By way of answer to the Government's petitions for writs of certiorari to review the judgments of the Court of Claims in these proceedings, and in opposition thereto,

we desire to submit certain suggestions on behalf of the respondents setting forth the reasons why, in our judgment, there is no necessity for the issuance of this extraordinary writ. In keeping with the action of the Government in its petition, we shall make reference to the facts in the Algoma Lumber Company case only, except where the context indicates reference to the Forest Lumber Company case.

The Government's statement of facts omits the following pertinent and important facts:

The payments under the contract relating to timber on unallotted lands and under the contracts with the holders of allotments were not only made to the Superintendent of the Indian School and taken into his books of account but were deposited, when not deposited in the United States Treasury, in private banks in the name of the Superintendent. The banks holding moneys beneficially held for Indian allottees kept no record of the individual accounts, but the funds so held in the name of the Superintendent, in a lump sum, were subject to withdrawal and distribution by him (Rec. 42).

The plaintiff protested the application, effective April 1, 1928, of the advance payments made by it to the Superintendent at the increased unit price (Rec. 29, 31); and the Commissioner directed the Superintendent to retain from all individual Indian accounts, pending the disposition of the plaintiff's protest, sufficient amounts to cover a refund of the increase in the lumber price on all timber cut from allotted lands effective April 1, 1928 (Rec. 31).

THERE ARE NO GROUNDS FOR CERTIORARI.

It is submitted that the contracts here involved, as disclosed by the Record, are so clearly contracts upon which the United States is suable under Section 145 of the Judicial Code that there is no occasion for this Court to review the judgments of the Court of Claims. The jurisdiction of the latter court is clear, we submit, for the following reasons:

1. The title to the land comprising the Klamath Reservation is in the United States, granted that the beneficial interest therein lies in the Indians. This Court, in *Shoshone Tribe* v. *United States*, 299 U. S. 476, and *United States* v. *Shoshone Tribe*, October Term, 1937, No. 668, held that the title to lands ceded to the Indians under just such a treaty as that with the Klamath Indians is in the United States, saying, in the earlier case:

> "Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents."

This Court held, further, that a treaty right of perpetual occupancy was not less valuable than the full title in fee, but nothing was held or said in either case in derogation of the long established principle that the legal title to such Indian lands lies in the United States.

2. Everything done concerning the sale of the timber, from the beginning to the end, including the disbursement of the proceeds, was done by officers and agents of the United States.

3. The United States, or an individual, is just as much liable upon a contract made by it as trustee as it would be were the contract not made in a trust capacity.

4. The moneys paid on the contracts, a part of which it is here sought to recover, are the moneys of the United States. *Bramwell v. United States Fidelity & Guaranty Company*, 269 U. S. 483, affirming the decision of the Circuit Court of Appeals for the Ninth Circuit in *Bramwell v. United States Fidelity & Guaranty Company*, 299 Fed. 705.

5. The Congress, in enacting the pertinent statutes, cannot be assumed to have intended that no one should be liable on a contract executed pursuant to Sections 7 and 8 of the Act of June 25, 1910. The Record shows that no contracts for the sale of Indian tribal timber have ever been made in the form and manner prescribed by R. S. 2103 (set forth in Appendix), which is the only statute prescribing a method for the making of Indian contracts.

6. As was pointed out by the Court of Claims in its opinion in the Forest Lumber Company case (Rec. (No. 246) 37), "any contract made by them (the Indians) would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be a nullity."

7. With reference to payment for timber cut from allotted lands: Advance deposits were made by the respondents to the Superintendent against which the latter charged the sums due for timber as it was cut. It could not be told, in advance, whether the timber

would be cut from allotted or unallotted lands. Moneys due for timber cut from allotted lands were later credited to the individual Indians on the Superintendent's books, but the moneys themselves remained on deposit in the Superintendent's name except to the extent that they were passed to the individual Indians through disbursements made by the Superintendent.

The Commissioner directed the Superintendent to retain, out of the accounts of individual Indians, amounts sufficient to cover the protested increase. Since the Government asserted the right to retain, and did retain, the amount of the contested increase, the Court of Claims was clearly correct in directing that the amounts retained be paid over to the respondents.

Furthermore, it would appear that the sum involved is insignificant. The Government and the respondents, in briefs on file in the Court of Claims, agree that the amount of money involved in the instant case is $116.46, being the sum produced by multiplying the timber cut from unallotted lands during the entire period by the contested increase of 40¢. The Government and the respondent Forest Lumber Company differ as to the exact quantity of timber cut in the Forest Lumber Company case from allotted lands, but the higher of the two amounts is a very small fraction of the amount of the judgment.

CONCLUSION.

It is submitted that the decision of the Court of Claims is clearly correct. No authorities are cited by the petitioner which throw doubt upon it.

Wherefore, it is respectfully submitted that the Government's petition for writs of certiorari should be denied.

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APPENDIX.

Section 2103 of the Revised Statutes, now contained in 25 U. S. C. A., Section 81, reads as follows:

"§81. CONTRACTS WITH INDIAN TRIBES OR INDIANS. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority, and the reason for exercising that authority, shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the

disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 245.

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VS.

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No. 246.

THE UNITED STATES OF AMERICA, PETITIONER,

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FOREST LUMBER COMPANY, A CORPORATION.

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THE UNITED STATES OF AMERICA, PETITIONER,

VS.

LAMM LUMBER COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENTS ALGOMA LUMBER COMPANY AND FOREST LUMBER COMPANY.

JESSE ANDREWS,
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BRIEF FOR RESPONDENTS ALGOMA LUMBER COMPANY AND FOREST LUMBER COMPANY.

SUPPLEMENTAL STATEMENT.

Respondents concur in the statement of petitioner that a determination of the applicable question of law in either the Algoma Lumber Company or the Forest Lumber

Company cases will be determinative of both cases. We will follow the course of petitioner in letting the references to the findings of fact be to the record in the Algoma case, except where otherwise shown by the context.

On March 21, 1917, the Assistant Secretary of the Interior approved a form of contract and regulations, and also a form of advertisement, for the sale of about 250,000,000 feet of pine and 10,000,000 feet of white fir upon approximately 15,700 acres, within certain townships, on what is known as Middle Mount Scott Unit, Klamath Indian Reservation, Klamath, Oregon. The form of contract, as approved, provided that it would extend for a period of fifteen years from April 1, 1917 (R. 10).

The advertisement required that sealed bids be addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon. Each bidder was required to state in his bid, for each species, the amount per M feet to be paid for all timber cut prior to April 1, 1920. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs, by three-year periods, within a certain limitation. Prospective bidders were informed that no bid less than $3.25 per M feet for pine, or 50¢ for white fir, for the first period, would be considered. Bids were required to be accompanied by a certified check in favor of the Superintendent of the Klamath Indian School in the amount of $5,000.00 (R. 11).

On May 28, 1917, respondent, in response to the published invitation for bids, made its proposal for the purchase of the pine at $3.57 and the white fir at 50¢ per M feet. A certified check as required accompanied the proposal (R. 11).

On June 4, 1917, the Special Agent in charge of the Klamath Indian School forwarded to the Commissioner of Indian Affairs an abstract of the bids received, and recommended that respondent's bid be accepted. On June 25, 1917, the Assistant Secretary of the Interior approved the recommendations made by the Commissioner of Indian Affairs on June 16, 1917, that the bid of respondent be accepted. On the same day he advised the Special Agent in charge of the Klamath Indian School of the acceptance of respondent's bid and directed him to prepare the contract and bond and submit it to the Department (R. 11).

The contract was entered into July 28, 1917, and approved by the Assistant Secretary of the Interior on September 14, 1917 (R. 11).

Pursuant to the provisions of paragraph 80 of the contract of July 28, 1917, respondent furnished a penal bond in the sum of $40,000 to guarantee the performance of its contract. The makers of the bond obligated themselves to pay to the United States the penal sum therein named on condition that the obligation of the bond would be inoperative in the event that respondent faithfully observed all the laws and regulations made for the governing of trade and intercourse with the Indians and complied with the regulations and terms of the contract (R. 15).

By the language of the written contract, the Superintendent of the Klamath Indian School agreed to sell to respondent, upon the terms and conditions therein stated, the timber on the area stated, and the respondent agreed that prior to April 1, 1932, it would cut and remove the timber covered by the contract and pay the Super-

intendent, for the use and benefit of the Klamath tribe of Indians, the value of the timber as stated in the contract.

The relevant portions of the contract are set out in the Special Findings of Fact (R. 11-14).

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which such Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned upon the books of the Treasury, and subject to the order of such Indian (R. 40).

The contract contained a provision which in effect gave the Indians that were holders of the allotments embraced in the sale area the option to include their allotment in the contract of July 28, 1917 (R. 13).

This provision of the contract was as follows:

> "The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell, and to pay to such Indians ten per cent of the estimated value of the timber on each allotmen within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area at the prices fixed for unallotted land" (R. 13).

No controversy with which we are here concerned arose in the performance of the contract prior to on or about April 1, 1928, the commencement of the third year of the fourth three-year period, which began April 1, 1926. The Commissioner of Indian Affairs (who will be hereinafter referred to as the "Commissioner") on or about that date gave notice that effective that date the price of the timber for the remainder of the three-year period would be increased by 40¢ per M feet (R. 32). Respondent, being unable to convince the Commissioner of the unlawfulness of this increase, continued thereafter to perform the contract but addressed a letter to the Commissioner protesting the increase and giving notice that the cash advances paid by it under the terms of its contract should not be applied to the payment for timber at a rate greater than $4.90 per M feet for pine, the pre-existing rate. Respondent also said in this letter that said protest was intended as a continuing one and if the deposits made by it were applied at the increased rate, respondent would seek to recover from the Government the amount of the excess so applied (R. 29).

On May 4, 1929, the Commissioner further informed respondent that the price during the year beginning April 1, 1929, would be the same as in the preceding year (R. 31) Respondent again addressed a letter to the Commissioner, referring to its previous protest. It protested that no part of the deposits made by it should be applied to the payment for timber at a rate greater than $4.90 per M feet. The Commissioner was informed that if applications were made at a rate in excess of that; respondent would take such action as was necessary to recover from the Government the excess amount so applied (R. 31).

The quantity of pine cut by respondent in the period April 1, 1928, to March 31, 1931 (when all of the timber had been cut), totalled 62,736,390 feet. That quantity of timber multiplied by 40¢ per M feet, the amount of the challenged price increase made effective April 1, 1928, and continued in effect during the remainder of the contract, totalled $25,094.56 which was the amount sued for and for which judgment was awarded.

The controversy in the Court of Claims (except for the question of jurisdiction) was as to the legality of the increase in the price made by the Commissioner (R. 1).

The suit was filed April 1, 1931. On April 25, 1934, petitioner filed a motion for leave to withdraw the general traverse filed May 11, 1931, and filed a plea to the jurisdiction in lieu thereof. On November 5, 1934, the plea to the jurisdiction was argued and on December 3, 1934, it was overruled without prejudice. Evidence was taken and the case was argued and submitted on the merits October 8, 1937 (R. 10).

The question of the correctness of respondent's position as to the imposition by the Commissioner of the additional charge of $25,094.56, which was the point upon which most of the time and effort were spent in the court below, is not brought forward by petitioner in this court, the petitioner apparently conceding the correctness of respondent's position. We are concerned here therefore only with the question of jurisdiction (except for a minor question in regard to the allotted lands, to which we shall refer later).

With respect to the method of paying for the timber under contracts such as the one of July 28, 1917, the practice followed by the Office of Indian Affairs was for the purchaser to make to the Superintendent an advance pay-

ment such as stipulated in Article 4 of the contract (R. 42), against which would be charged the timber subsequently cut on the basis of the contract price and to repeat this operation from time to time.

The Act of March 3, 1883 (22 Stat. 582, 590), as amended by the Act of May 17, 1926 (44 Stat. 560), provides in substance that the proceeds of sales of timber on any Indian reservation, except those of the Five Civilized Tribes, shall be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of the tribes and under such regulations as the Secretary of the Interior shall prescribe (R. 40).

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any Indian Agent, Superintendent, etc., to deposit Indian money, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds (R. 41).

The tribal timber contract of July 28, 1917, and the several contracts made by respondent with the holders of allotments were administered as one contract and all the proceeds arising under such contracts were paid to the Superintendent of the Klamath reservation (R. 41).

Upon receipt of the proceeds from the purchaser, the Superintendent made a credit upon the books kept in his office at the Klamath Agency in Oregon showing the amount of money payable to the Klamath Indian tribe and also the respective sums of money payable to the individual Indian allottees concerned. These amounts were determined from reports showing the quantity of timber cut from the respective areas (R. 42).

All the proceeds paid by respondent for timber cut under the tribal timber contract and the several allotment contracts, less the sum of 8% thereof, were deposited by the Superintendent either in the Treasury of the United States or in private state banks. The proceeds from the tribal contract were deposited in the Treasury under an account designated "Indian moneys, proceeds of labor, Klamath Indians" (R. 41). The moneys belonging to individual Indian allottees were deposited in private banks in a lump sum to the credit of the Superintendent or disbursing officer of the Indian Agency who held such moneys in trust for the respective Indian allottees. The bank selected as depositary for individual Indian moneys kept no record of the individual Indian accounts; that is, the trust funds were subject to withdrawal by the Superintendent of the reservation and were distributed by him to the individual owners thereof under regulations prescribed by the Commissioner and approved by the Secretary of the Interior (R. 42).

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber; in accordance with Paragraph 21 of the amended Regulations, approved March 17, 1917, and the provisions of Section 1 of the Act of February 14, 1920 (41 Stat. 415), which authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incidental to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales of such timber. This 8% was deducted by the Superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses of administering the contracts of sale and the Indian forests. It was deposited in the Treasury to the

credit of the United States, under the caption "Miscellaneous Receipts" (R. 41-42).

SUMMARY OF ARGUMENT.

1. The Court of Claims had jurisdiction because the suit is a claim founded upon an express contract with the Government of the United States. The basis of the contract of July 28, 1917, is the Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C. Title 25, Sec. 406) which directs that the timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior. These regulations provide, not that the Indian tribe may sell the timber or even have a voice in the sale of it, but that it shall be sold by the joint action of the Commissioner of Indian Affairs, the Superintendent of the Indian Reservation and the Secretary of the Interior, each doing his part. If respondent may be deemed to be the "party of the second part" in the contract, then the Government of the United States may be said to be the "party of the first part," for it is with it that the contract was made. The performance of the contract, from the Government's point of view, was supervised by the officers mentioned. The authority (within certain limitations) to increase the contract price was vested in the Commissioner of Indian Affairs. It was the United States, through its duly appointed officers, who served notice upon respondent that unless it paid the added price (40¢ per M feet, which the Court of Claims held was illegally demanded), its cutting of the timber would be stopped. The money paid by respondent under the contract, including that paid under protest and now in controversy, was paid to the Superintendent and was ultimately covered into treasury of the United States.

2. The United States is liable upon a contract made by it in its capacity as Trustee or Guardian of the Klamath Indians. Section 145 of the Judicial Code is broad and grants to the Court of Claims jurisdiction to hear and determine all claims founded upon "any contract, express or implied, with the Government of the United States." The contract of a trustee or guardian imposes a personal liability upon such representative, unless the contract itself provides otherwise. There is no limitation or exception in the language of Section 145 of the Judicial Code, and there are no just grounds for limiting the broad consent of the United States to be sued, as expressed in said section.

3. The Court of Claims had jurisdiction because the suit is a claim founded upon an implied contract of the Government of the United States to return the money paid under protest if it should be determined that such amount was illegally demanded. The United States, through its duly authorized officers, was threatening to refuse to permit respondent to continue its logging operations on the lands under the contract. There was no doubt that it, right or wrong, had the power to do this. To avoid this greater loss, respondent complied with the demands of the United States, but gave notice that it did so under protest and would sue to recover the money from the Government. The money so paid was covered into the Treasury. The Court of Claims found that this amount was illegally demanded of respondent. Petitioner in this court does not assail the correctness of this finding. There was an implied contract that under these circumstances the money would be repaid.

4. After the Court of Claims had rendered judgment petitioner, for the first time, made the point that of the

62,736,390 feet of timber cut after the increase was made effective, it had not been shown how much came from the allotted lands. The contention is now made that the contracts for the timber on the allotted lands were contracts, not of the United States, but of the individual Indians, and that as to such contracts a recovery cannot be had, even though a recovery be allowed as to the contract covering the unallotted lands. Hence it is urged that if the judgment of the Court of Claims is not reversed, nevertheless, the case should be remanded for an accounting as to this one point.

Neither the findings of the Commissioner of the Court of Claims nor an examination of the record discloses that any timber was cut by respondent from allotted lands. (The Court of Claims does find that respondent entered into twenty-one contracts with individual Indian allottees. (R. 39[1]).

Hence, on the record there is no basis for the contention made by the petitioner as to the allotted lands. (After this point was made by petitioner in its Motion for New Trial in the Court of Claims, respondent made an investigation and discovered that excess payments to the amount of $116.46 had been made with respect to timber cut from allotted lands, the correctness of which amount was conceded by Government in a brief filed in the Court of Claims.[2])

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[1]There is no finding in the Forest case that any contracts with individual allottees were entered into by respondent Forest Lumber Company.

[2]The situation is similar in the Forest case, except in this case respondent found the excess payments as to allotted lands to be $29.94 and the Government found them, according to the brief mentioned filed in the Court of Claims, to be $3,200.89.

The provisions in the contract of July 28, 1917, relating to the allotted lands and hereinbefore referred to, amounted to no more than an option to the Indian allottees to avail themselves of the contract of July 28, 1917 (R. 13, 39). They could either elect to come in under this contract or not to do so. If the former, all of the terms and provisions of the contract of July 28, 1917, would apply to the allotments. There would be no change in price or in any of the other terms of the contract, and the United States would operate the contract as far as the allotments were concerned to the same extent and in the same way as it would operate the contract as to the unallotted lands. The allottees would have no voice in fixing the price or in making any of the other terms of the contract and no voice in its control and management. These would rest in the United States.

Where allottees exercised their option to come in under the contract of July 28, 1917, there remained, in reality, but one contract (R. 41) and the contract was that of the United States.

Payments made by respondent for timber cut under allotment contracts were made directly to the Superintendent of the Klamath Agency and this officer was instructed by the Commissioner of Indian Affairs, upon receipt by the latter of respondent's protest, to retain in all individual Indian accounts a sufficient amount to cover a refund of 40¢ per M feet on all timber cut from allotments and paid for at the advanced price effective April 1, 1928 (R. 31). Since the money which was illegally demanded of respondent was impounded in the hands of the United States, the decision of the Court of Claims ordering its return was correct. Furthermore, the amount involved is inconsequential. It is only $116.46.

ARGUMENT.

I.

The suit involves a claim founded upon an express contract with the Government of the United States.

The nature of the interest of the Indians in lands such as those as were the subject of the contract of July 28, 1917, has been made clear by the decisions of this Court and no discussion thereof is deemed necessary here. It may be seen from the recent opinion, *United States v. Shoshone Tribe of Indians*, 304 U. S. 119. In essence, it is that the Indians are entitled to the complete use and enjoyment of the lands, including the timber thereon and the minerals therein, and the United States holds the title and has the management and control of the lands for the use and benefit of the Indians.

Prior to February 16, 1889, there was no statutory authority for the sale of such lands by the United States. On that date there was passed the Act of February 16, 1889 (25 Stat. 673). This act was superseded by the Act of June 25, 1910 (36 Stat. 855), by virtue of which the sale evidenced by the contract of July 28, 1917, was made.

Section 7 of the Act of June 25, 1910, is as follows:

> "Sec. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: Provided, that this section shall not apply to the states of Minnesota and Wisconsin."

It will be observed that the policy declared by Congress in this legislation was not that sales might be made by the Indian tribe if approved by an executive officer of the Government or be made by the tribe to any extent whatsoever, but was that the sales should be under regulations to be prescribed by the Secretary of the Interior, retaining in the executive branch of the Government of the United States complete and exclusive authority for the making of sales of Indian timber.

Section 17 of the regulations prescribed by the Secretary of the Interior pursuant to this Act directs that sales involving a stumpage value of not exceeding $50,000.00 may be made from unallotted lands by the Commissioner of Indian Affairs, or from allotments with his approval, and that sales involving a stumpage value exceeding $50,000.00 shall be made (that is, by the Commissioner) only with the express approval of the Secretary of the Interior (R. 15).

The detailed statement, hereinbefore set out, of the steps taken by the administrative officers of the Government leading up to the making of the contract of July 28, 1917, indicates that everything done was included within the authority conferred by the Act and the regulations made pursuant thereto, and that the action taken by parties to the contract other than respondent was solely that of officers of the Government and in no sense whatever that of the Indian tribe.

After the contract had been entered into, it was the officers of the United States with whom respondent dealt in performing the contract. It was the Commissioner of Indian Affairs upon whom was conferred the authority (within certain limitations) to increase the initial contract price for successive three-year periods. It was an

administrative officer of the Government, that is the Superintendent of the reservation, who admitted respondent to the possession of the lands to carry on its logging operations. It was such officers of the Government that respondent was required to satisfy as to its method and manner of conducting its logging operations. It was such officers who could dispossess respondent at any time if it failed to conform to the requirements of the contract. It was to one of such officers of the Government of the United States that respondent made its payments under the contract and it was into the Treasury of the United States that these payments were covered.

If respondent could be said to be the "party of the second part" to the contract, the Government of the United States could just as truly be said to be the "party of the first part."

Unwarranted emphasis and importance, we submit, is by petitioner, in its brief, placed upon and attached to the single clause in the contract of July 28, 1917, reading:

> "This agreement made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July, 1917, * * * between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and the Algoma Lumber Company, of Algoma, State of Oregon, party of the second part."

This, petitioner would have the court take as conclusive on the question as to who are the parties to the contract. This reasoning, we submit, is unsound. The form of the contract, of which the clause quoted is but a very small part, is itself only a single item in a comprehensive plan for selling Indian timber prescribed by the De-

partment of the Interior pursuant to the act of 1910. The whole plan and procedure promulgated by the regulations is to be taken into consideration in determining the nature of the status of the United States in the transaction, and when this is done it becomes apparent that the agreement was entered into not so much "for and on behalf of the Klamath Indians" as "for and on behalf of the Government of the United States."

This point was clearly perceived and admirably stated by Justice Green, speaking for the Court of Claims in the *Lamm Lumber Company* case, when he said:

> "We think that where one executes a contract solely under his own powers and rights, he becomes liable thereon, although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for and on behalf of another party does not necessarily make the contract one of the party who acquired the beneficial interest."

The relationship of the United States to such a contract as that of July 28, 1917, was brought in question in the case of *United States Fidelity & Guaranty Co.* v. *Bramwell, Superintendent of Banks for the State of Oregon*, 295 Fed. 331, 333, affirmed on appeal by the Circuit Court of Appeals, 9th Circuit, 299 Fed. 705 (1924) and by this Court in *Bramwell* v. *United States Fidelity Company*, 269 U. S. 483. A bank in Klamath Falls, in which there had been deposited to the credit of the Superintendent of the reservation money paid under a contract such as this, had failed and to the claim of the Government for priority, such as it would be entitled to if the moneys had been moneys of the United States, the objection was interposed

that the contract under which the money was deposited was made for the benefit of the Indians and that the deposits were not really the moneys of the United States. The lower court, in rendering the decision which was affirmed, said:

> "The position of the defendant is that the statute giving the United States priority was designed to protect the public revenues, * * * and since the debt here in question was for money held by the United States for the use and benefit of the Indians residing on the Klamath Indian Reservation, the statute has no application. * * * The language is general and without qualification. It applies to all persons indebted to the United States. The form of the indebtedness is immaterial. *Lewis* v. *U. S.*, 92 U. S. 618, 23 L. Ed. 513.
>
> "The debt here in question was due from the bank to the United States, both by the terms of the deposit and the condition of the bond given for its security. The United States was the only party to which the obligation ran, and which could enforce it. It is true the money was held in trust for the use and benefit of the Indians, but that does not make the indebtedness of the bank any the less an indebtedness to the United States. The United States, under the treaty with the Klamath Indians (16 Stat. 707) and various acts of Congress (R. S., Secs. 441, 465 and 2068 [Comp. St. 681, 723, 4014]; Comp. St., Secs. 4069 and 4072; 36 Stat. 856; 40 Stat. 591 [Comp. St., 1918, Comp. St. Ann., Supp., 1919, Secs. 4077aa, 4078a]), is the guardian of the Indians on the reservation, and as such supervises and manages their affairs, collects and disburses funds intended for their benefit, and may sue to enforce and protect their rights and obligations. * * *"

Light is thrown on the question as to whether this is a contract with the Government of the United States if we

consider for a moment what would have been the result, from a legal standpoint, if during the course of the performance of the contract by respondent, the Commissioner of Indian Affairs, or one of the other executive officers of the United States charged with the duty of administering the contract, had, by an improper exercise of authority in the discharge of the duties of his office, ejected respondent from the lands and unlawfully denied it the right to continue to cut timber under the contract. The control over the possession and enjoyment of the use of the lands was in the executive branch of the Government of the United States and if it at any time had determined that respondent should no longer be permitted to cut the timber, respondent would have been compelled to withdraw. If this withdrawal had taken place because of an improper and unwarranted exercise of authority by the officers of the Government of the United States, in the discharge of their duties, the damages resulting from the breach of contract would have given rise to an action based upon the contract of which the Court of Claims would have jurisdiction.

The position taken by the Commissioner of Indian Affairs resulted in respondent's being confronted with the necessity either of paying the increased price, unlawfully demanded, or relinquishing possession of the lands and thereby sustaining a greater loss. The Commissioner of Indian Affairs served notice that effective April 1, 1928, no timber could be cut unless it was paid for at an increased price of 40¢ per M. This was in effect notice to respondent that unless it complied with this demand it would be forced to withdraw from the premises. It might have taken the latter course and instituted suit against the Government for the loss resulting. As to such a

suit, it would seem that the jurisdiction of the Court of Claims was clear. It chose the other course in order to mitigate the damages. It paid the amount demanded, but it served notice that it did this under protest and only in order to avoid the larger loss; that it would sue to recover the amount due from the Government. Such is this suit.

This point is well stated by Justice Williams of the Court of Claims in the concluding part of his opinion in the *Forest Lumber Company* case:

> "The defendant further contends that the contract sued upon is not a contract with the United States within the meaning of section 145 of the Judicial Code, and that the suit is, therefore, not maintainable under the Court's general grant of jurisdiction. It is urged that in making the contract the defendant's officials were merely acting for the Indians in their behalf and for their interest, and that consequently there was no responsibility on the part of the defendant for the performance of the contract. In other words it is contended the contract is not a contract by the defendant but a contract of the Klamath Indians. The contract recited it was made by 'the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians,' and that the purchaser agreed to pay the value of the timber to 'the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians.' The contract referred to the Klamath Indians as the 'party of the first part' which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School 'for the use and benefit of the Klamath Tribe of Indians' the value of the timber at prices fixed in the contract.

But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them, it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it, and any contract made by them would not be binding; and, as it would not be binding upon the Indians it would not be binding upon the other party and would be merely a nullity. The contract was executed and approved by the officials of the defendant in strict accordance with the laws of the United States. Undoubtedly, the contract is a contract of the defendant within the meaning of section 145 of the Judicial Code."

Congress has made specific provision as to the matter in which contracts with the Indian Tribe shall be executed. These provisions, formerly Section 2103 of the Revised Statutes, are now contained in Title 25, U. S. C., Section 81. This section, which we set out in full, *infra*, p. 27, requires, among other things, that the agreement be executed before a judge of a court of record. Admittedly, the requirements of this section were not complied with. In fact, the Court of Claims found that no contracts for the sale of Indian timber have ever been made in the form and manner prescribed by it (R. 40). Were the contract

of July 28, 1917, actually one with the Klamath Tribe of Indians, the contract would be void under the decision of this Court in *Green* v. *Menominee Tribe of Indians*, 233 U. S. 558.

We submit that the failure of the officers of the Department of the Interior to comply, or cause compliance to be made, with the provision of this section is cogent proof that the contract of July 28, 1917, was not a contract with the Klamath Indians.

II.

It is undoubtedly true that the picture of the ordinary trustee or guardian, in private life, does not fit precisely the situation of the United States as it exists with respect of the Indians. However, this Court as late as the *Shoshone Tribe case, supra*, has used the term "guardian" as representing the relationship of the United States to the Indians and refers to the rule governing transactions between a guardian and his ward as an analogy in its consideration of the construction of a treaty between the United States and the Shoshone Tribe. It is indubitably true that the United States may be a trustee. *McDonogh's Executrix et al.* v. *Murdoch et al.*, 15 How. 68. It is also clearly established that the contracts of a trustee are personally binding upon the trustee, unless the contract provides against such personal liability. *Taylor* v. *Mayo* (*Taylor* v. *Davis*), 110 U. S. 330. In this case, the Court, in holding trustees liable upon an agreement which bore their signatures followed by words indicating their trust capacity, used the following language:

> "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined

generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal."

This is in accordance with the statement in Section 262, Restatement of Trusts, where it is said:

"Except as stated in Section 263, the trustee is subject to personal liability upon contracts made by him in the course of the administration of the trust."

The exception in Section 263 of the Restatement is limited to cases where by the contract it is provided that the trustee shall not be personally liable.

III.

The Court of Claims had jurisdiction because the suit is a claim founded upon an implied contract of the Government of the United States to return the money paid under protest if it should be determined that such amount was illegally demanded.

If it should be held that the contract of July 28, 1917, was one which did not pertain to purely governmental affairs and that for this reason, although a contract of the United States, was not such a one as was contemplated by Section 145 of the Judicial Code, we nevertheless submit that the Court of Claims had jurisdiction because of the implied contract, on the part of the Government of the United States, under the circumstances, to return the money paid under protest.

In saying this, we are not unmindful of the fact that it is well established that as to liability on implied con-

tracts, the United States is liable only upon a contract implied in fact and not upon a contract implied in law. *Goodyear Tire & Rubber Co. v. United States*, 276 U. S. 287, 293, and cases there cited.

This is a case of a contract implied in fact.

Proceeding with the performance of the contract of July 28, 1917, and depending upon the logs to be obtained thereunder for the logging of its sawmill, respondent received notice on or about April 1, 1928, from the Commissioner of Indian Affairs that, effective that date and continuing for at least one year, the contract price of the timber would be increased 40¢ per M feet. The implication of the notice, after all efforts to convince the Commissioner of Indian Affairs of the illegality of the demand had failed, was that unless payments were made at this rate respondent would be denied the right to continue its logging operations under the contract. Respondent decided that, rather than submit to having itself dispossessed, it would pay the increased amount under protest and notify the Commissioner that the deposits made by it under the contract should not be applied at a rate greater than the price prevailing just before the increase of 40¢ per M was made, and notify the Commissioner further that if such deposits were applied at a greater rate, respondent would seek to recover from the Government the amount of the excess so paid. Payments were made accordingly and respondent remained in possession of the lands until March 31, 1931, when all of the timber had been cut, the Commissioner having continued the 40¢ increase in price in effect up to that time over the protest of respondent. The increase accounted for the amount for which suit was filed by re-

spondent. It was covered into the Treasury of the United States. The Court of Claims has sustained the contention of respondent that the amount was illegally demanded and the correctness of this holding is not questioned in this court. We submit that because of these circumstances the United States is liable on an implied contract to pay the amount sued for.

Northern Pacific Ry. Co. v. *United States*, (Court of Claims) 18 F. Supp. 543, 560, certiorari denied 302 U. S. 750.

Knote v. *United States*, 95 U. S. 149.

In *Northern Pacific Ry. Co.* v. *United States, supra*, the Government held certain bonds of the Railway Company deposited to secure an advance payment under the guaranty provisions of the Transportation Act. The Government asserted a claim for over-payment. The Railway Company agreed with the Comptroller General that the bonds might be held as security and that it would pay the amount demanded upon final determination by a court of last resort that it owed the Government such amount. After an unsuccessful attempt to secure review by certiorari of the Interstate Commerce Commission's determination that the amount was due, the Railway Company paid the claim of the Government to procure a release of the bonds and stop the running of interest, making the payment under protest and without admitting the legality of the claim. It was subsequently held that the claim was invalid. The Railway Company brought suit in the Court of Claims to recover

the amount paid. The Court of Claims held that the Railway Company was entitled to recover the amount, saying

> "There can be no doubt that the government's demand was illegal. That fact was definitely determined in the case of *U. S.* v. *Great Northern Railway Company.* Nor can there be any doubt that the payments were reluctantly made in consequence of the illegal demand, that being the only way in which plaintiff could regain possession of its property. In view of these facts we are impelled to hold that the payments sought to be recovered were involuntarily made by plaintiff, and under circumstances amounting to coercion and duress. The Secretary of the Treasury necessarily accepted the payments made by plaintiff upon the terms set forth in the letter of plaintiff's counsel tendering the payments, and an implied contract thereupon arose on the part of the defendant to refund the payments so made in case plaintiff was not indebted to the United States. Plaintiff is therefore entitled to recover and is hereby awarded judgment in the sum of $1,521,696.93."

IV.

We have discussed in the concluding portion of our summary of argument (*supra*, pp. 9-12) the point made by the Government with reference to payments for timber cut from allotted lands, and we believe we have there fully shown that the decision of the Court of Claims ordering the return of the illegal increase with respect to such timber was correct.

CONCLUSION.

We submit that the Court of Claims had jurisdiction of the cases under Section 145 of the Judicial Code, and that its judgments should be affirmed.

Respectfully submitted,

JESSE ANDREWS,
CARL D. MATZ,
WILLIAM S. BENNET,
Attorneys for Respondents, Algoma Lumber Company and Forest Lumber Company.

December, 1938.

APPENDIX.

Section 2103 of the Revised Statutes (U. S. C., Title 25, Section 81) provides as follows:

"§81. CONTRACTS WITH INDIAN TRIBES OR INDIANS. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority, and the reason for exercising that authority, shall be given specifically.

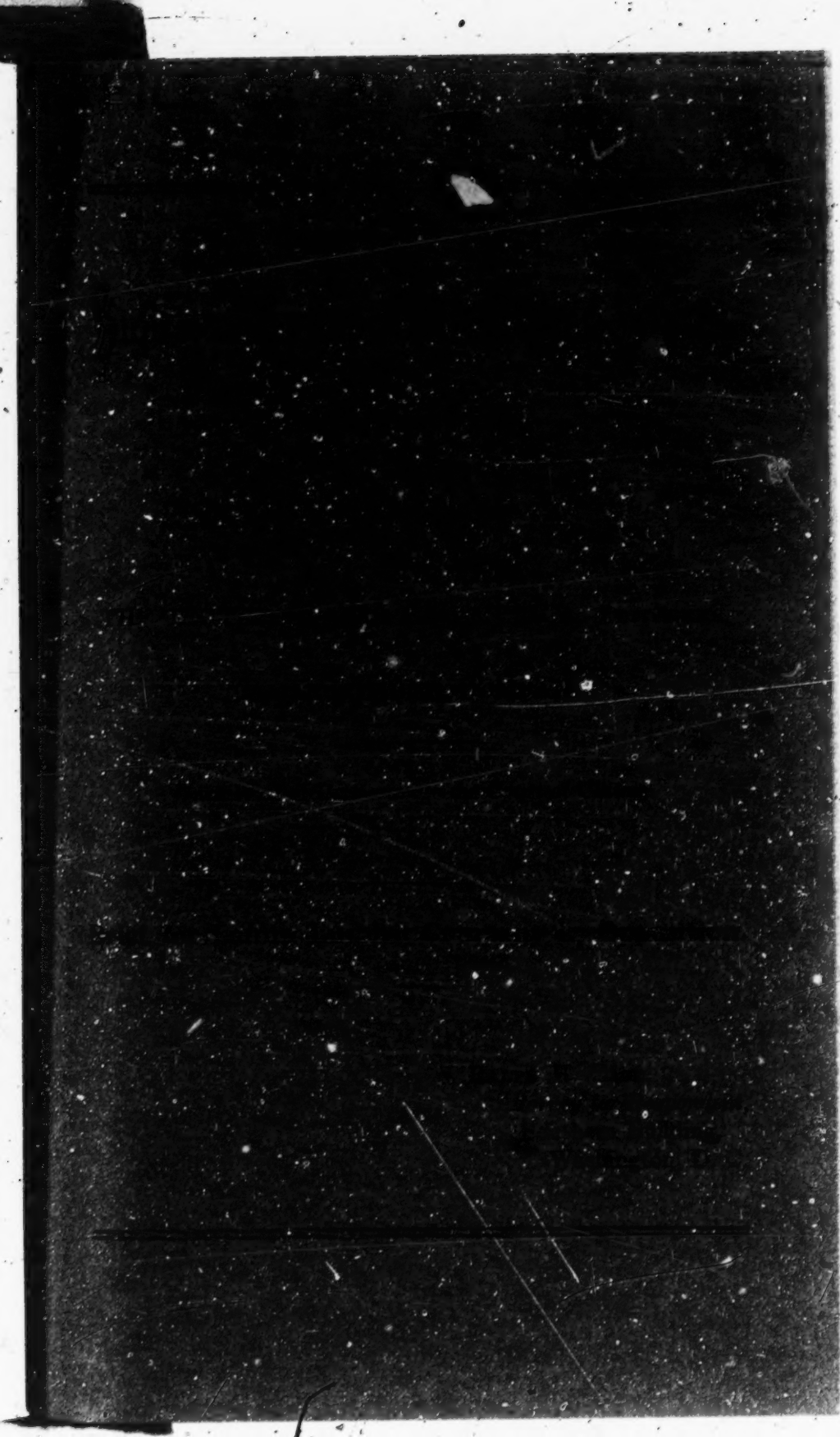
"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and,

if for the collection of money, the basis of the cla the source from which it is to be collected, disposition to be made of it when collected, amount or rate per centum of the fee in all ca and if any contingent matter or condition constitu a part of the contract or agreement, it shall specifically set forth.

"Fifth. It shall have a fixed limited time to ru which chall be distinctly stated.

"Sixth. The judge before whom such contra or agreement is executed shall certify officially time when and place where such contract or agre ment was executed, and that it was in his presence and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."



INDEX.

Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 247.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

LAMM LUMBER COMPANY.

On a writ of Certiorari to the Court of Claims.

BRIEF FOR LAMM LUMBER COMPANY IN OPPOSITION.

OPINION BELOW.

The Opinion of the Court of Claims (R. 23) has not yet been reported.

JURISDICTION.

The judgment of the Court below was entered January 12, 1938 (R. 23). The Petition for Writ of Certiorari was filed August 2, 1938. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the contract entered into by the Secretary of the Interior under the authority contained in Section 7 of the Act of June 25, 1910 (U.S.C. Title 25, Sec. 406) and the regulations issued thereunder, with respondent for the sale of standing timber on unallotted lands of the Klamath Indian Tribe, is a

contract founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract express or implied with the Government of the United States.

2. Whether a contract, express or implied, between the United States and respondent exists in a bond given by the respondent to the United States guaranteeing the performance of a contract for the sale of timber on an Indian Reservation made pursuant to Section 7 of the Act of June 25, 1910, *supra*.

3. Whether an implied contract exists between the United States and the respondent arising out of the violation of the terms of a contract or contracts made pursuant to Section 8 of the Act of June 25, 1910 (U.S.C., Title 25, Sec. 407) and regulations issued thereunder, for the sale of standing timber on land allotted to individual Indian allottees of the Klamath Indian Reservation.

STATUTES INVOLVED.

The applicable portion of Statutes involved are as follows:

Section 145 of the Judicial Code (U.S.C., Title 28, Sec. 250) provides in part as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, * * *.

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U.S.C., Title 25, Sec. 406, 407), provides in part as follows:

> SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary

of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

STATEMENT.

The material findings of fact and the material parts of the Opinion of the Court below may be summarized as follows:

In March, 1917, the Assistant Secretary of the Interior advertised for sale about 160,000,000 feet of timber (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir upon about 11,500 acres within township 33 south, range 7 east, on what is designated as Southern Mount Scott Unit, within the Klamath Indian Reservation, Klamath, Oregon. (R. 23.)

On June 27, 1917, a contract was signed by the plaintiff below and by the Superintendent of the Klamath Indian School, State of Oregon. This ontract was later approved by the Assistant Secretary of the Interior. (R. 23.)

Under the contract, the party of the first part agreed to sell to the party of the second part all merchantable dead timber standing or fallen, and all live timber marked or designated for cutting by officers of the Indian Service, estimated to be about 160,000,000 feet board measure, log scale of pine timber (about 95% yellow pine and 5% sugar pine), and about 10,000,000 feet of white fir, located upon an area of about 11,500 acres of land, designated as the Southern Mount Scott Unit within the Klamath Indian Reservation. (R. 23.)

The contract provided for a set price from its inception up to April 1, 1920, and that for the three-year periods of the contract term beginning April 1, 1920, April 1, 1923, April 1,

1926, and April 1, 1929, the price should be fixed by the Commissioner of Indian Affairs in the manner specified in the contract (R. 27–28), to wit.

> "It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1, of the year in which the new prices are fixed." (R. 24.)

Increases in the stumpage price of timber were made for the periods beginning April 1, 1920, and April 1, 1923. (R. 28.)

On April 1, 1928, the Commissioner of Indian Affairs increased the price of timber 40 cents per thousand board feet, which increase was protested by Lamm Lumber Company, respondent herein, on the ground that neither the Commissioner of Indian Affairs nor the Secretary of the Interior had the right under the contract to increase the price until April 1, 1929. (R. 29.)

From April 1, 1928, the date on which the challenged price increase was made effective, to April 30, 1929, the company scaled a total of 30,315,980 feet of pine timber. That quantity of timber at 40 cents a thousand feet board measure totals $12,126.39, which was paid by plaintiff upon demand of the Indian Commissioner. (R. 30.)

The Court below in its Opinion held:

> "The case is a very peculiar one and we find no authorities directly in point. The contract recited it was made by 'the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians,' and that the purchaser agreed to pay the value of the timber to 'the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians.' The contract referred to the Klamath Indians as the 'party of the first part' which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School 'for the use and benefit of the

Klamath Tribe of Indians' the value of the timber at prices fixed in the contract. But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them; it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it. Any contract made by them would not be binding; and, as it would not be binding upon the Indians, it would not be binding upon the other party and would be merely a nullity. We think that where one who executes a contract acts solely under his own powers and rights he becomes liable thereon although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for and on behalf of another party does not necessarily make the contract one of the party who acquired the beneficial interest. We think the words 'in behalf of' and 'for the benefit of' were used in the contract under consideration for the purpose of showing that the benefits of the contract accrued to the Klamath Indians and not to the United States. Moreover, if the Government was not responsible on the contract, no one was. It is contended that the Government acted in its sovereign capacity in making the contract. This principle applies in certain cases where damages are alleged to result from laws passed by Congress, approved by the President, and then put in force, but we think the principle has no application here. In one sense the Government did act in its sovereign capacity but it is in the same sense that it acts in making any contract which its sovereign powers authorize it to execute. We think the Government can not be heard to deny its responsibility." (R. 34–35.)

ARGUMENT.

In the case at bar there certainly was a contract; the contract unquestionably was violated; and the respondent was required to pay over to the United States money which the United States was not authorized by the contract to exact.

The Petitioner alleges that the contract was not with the United States, despite the fact that the contract itself recites it was made pursuant to a statute of the United States, that it was signed by an officer of the United States and approved by the Secretary of the Interior of the United States. The contract itself was inclusive of the entire area. The bond which was given for due performance of the contract included the entire area of timber to be cut by the respondent. The record shows that the Interior Department made the contract. Nowhere in the record is there any showing that the Indian Tribe which held the beneficial interest in the timber had anything whatsoever to do with the making of the contract, with the authorization of the sale of the timber, with the execution of the contract or with the administration thereof. In fact, the record fails to disclose the presence of the Klamath Indian Tribe, except in the declaration that the monies derived from the sale of the timber are for the benefit of the Klamath Indian Tribe. This declaration in the contract is the reverse of a self-serving declaration in that it is a self-obligating declaration by the United States. Nothing in the contract and nothing in the record shows that the respondent herein was obligated to determine the use of the proceeds derived from the sale of the timber. The respondent had no control over and no interest in the proceeds derived from the sale of the timber after the same were paid over to the United States, and it seems to respondent fanciful to suggest that the Klamath Indian Tribe was the real party to the contract. The respondent had no way, so far as the contract and the record is concerned, of even being cognizant that there was an Indian tribe, whether Klamath or other tribe. The Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent of the Klamath Indian School, all officials of the United States, were

the ones with whom respondent dealt and were the ones with whom respondent contracted.

Respondent gave a bond for the due performance of its contract. That bond is in the record (P. 16): The obligation of that bond is to the United States of America. The coverage of the bond is the entire area of timber sold to respondent by metes and bounds description which includes every standing tree which respondent was supposed to cut. (R. 16.) The penal sum in the bond, $30,000, was payable to the United States of America. In the event the respondent had failed in its contract or deviated therefrom, not the Klamath Indian Tribe, but the United States of America, would have proceeded on the bond and in fact and in law the Klamath Indian Tribe could not have proceeded on that bond. It cannot be said that this bond is not a good, valid and subsisting obligation. If the bond was good, it was good only because it related to and supported a contract of the United States. It appears to respondent as inescapable that the bond declares the United States to be the contracting party in the contract between the United States and respondent.

The fact is established that the price of lumber to respondent was increased April 1, 1938, which was a date not in conformity with the dates expressed in the contract, whereon the stumpage price for timber could be increased. Respondent asks the question: "By whom was the increase in the price of timber made April 1, 1928?" The record discloses the answer. This increase was made by the Commissioner of Indian Affairs. The record does not show that it was made by the Klamath Indian Tribe nor by any one acting for or on behalf of the Tribe, but the record shows definitely that the increase was made over the signature of the Commissioner of Indian Affairs acting in his capacity as an officer of the United States. Undoubtedly this was a violation of the contract and it matters not which horn of the dilemma the petitioner now takes. If this increase in price was a violation of the express terms of a contract with the United States, then the United States is liable. This is so obvious that no citations are necessary. If, on the other horn of the dilemma this was a violation of a contract, over which

the Commissioner of Indian Affairs exercised a supervisory power only, then it was the unauthorized taking of money by the United States and the respondent is entitled, upon the implied contract, to the repayment of that money.

The Court below has already found that the right of the petitioner below to recover rests upon the contract either expressed or implied.

On the question of the timber cut from allotted lands as distinguished from tribal timber on unallotted lands, the situation is virtually the same as previously stated. The allottees, twenty-three in number, referred to in the basic contract, are referred to in the basic contract and do not appear at any other place in the record. The twenty-three separate sub-contracts are not set out in the record. One such sub-contract, however, does appear. That on its face is a contract of acquiescence in the terms and conditions of the basic contract covering the inclusive area which respondent, Lamm Lumber Company, was to cut over and pay for. From and after the appending of a signature to the sub-contract, the Indian holder of the separate allotment or allotments disappears from the record.

The respondent made no complaint over the terms of its contract. It paid the price required by the contract and it paid the increased price made in accordance with the contract. When, however, April 1, 1928, arrived, an inopportune date in accordance with the terms of the contract, the individual Indian allottees did not demand of respondent that an increase to them individually or collectively be paid. Another instrumentality, however, did make that demand and that instrumentality was the Commissioner of Indian Affairs, an officer of the United States. It matters not to the respondent whether the Commissioner of Indian Affairs was acting as guardian of the Klamath allottees or whether he was acting as an officer of the United States. So far as respondent is concerned, the Commissioner of Indian Affairs arbitrarily, over respondent's protest, without justification, increased the price of timber 40 cents per thousand board feet and required and demanded of respondent the payment of this increased price. The result

of such demand is that the petitioner herein, the United States, has and holds respondent's money in the amount found by the Court below ($12,126.39) and it matters not on what basis the respondent seeks to avoid repayment, the respondent simply says that the United States has its money without authority and that upon the implied contract set up by such action the United States is bound to repay to respondent the sum of $12,126.39.

There is a further angle concerning which the respondent respectfully requests the attention of the Court, and that is this,—the United States itself shared in the increase in the price of timber which was enforced by the United States on April 1, 1928.

At all times under the basic contract and under the contracts covering the several allotments within the area to be cut over by respondent, the United States took and held for its own use and purposes 8% of the gross received from respondent for the timber, that is to say, the contract was made for the benefit (to the extent of 92%) of the Klamath Indian Tribe and the percentage retained by the United States for the costs of administration was 8%. Now, however, when the United States, through its officer, the Commissioner of Indian Affairs, increased the price of timber, then to that extent, and to 8% of the increase, the United States made a profit. Administrative costs could not conceivably have been more after April 1, 1928. The mere handling of additional funds was a matter of bookkeeping, the same regulations prevailed, the same inspection, all as provided for in the basic contract. But by this increase the United States pocketed 8% of the money extracted from respondent. It is true the amount in dollars is not large in comparison with the total expenditures annually made by the United States, but the principle involved is important and as this definitely appears from the record, i. e., that the United States did retain for itself 8% of the increase in the price of timber, it definitely appears that the United States made itself a party to the transaction.

If without all that has gone before it might be said that the United States was not a party to the contract, then by this

element of profit taking alone the United States is definitely established as a party to the contract in that it shared in the proceeds and in that it shared in the arbitrary increase of price to respondent.

Petitioner places considerable reliance upon the statement that there are no decisions upon this or corresponding cases. This allegation may be true but the allegation establishes nothing other than the fact that violations of this particular type of contract may not have occurred heretofore.

CONCLUSION.

On the facts found by the Court of Claims and on the opinion of that Court, the respondent submits that the opinion of the Court below should be affirmed. The Court below has the power to find for plaintiff either upon an express or an implied contract. The Court below plainly indicated that its finding was upon the express contract so far as it related to the unallotted lands and upon either the express or implied contract so far as it related to the allotted lands. The upshot of the controversy is simply this,—that the petitioner, the United States, has $12,126.39 which it has extracted from respondent, Lamm Lumber Company, which the Court of Claims has found to be due and repayable to Lamm Lumber Company and which decision and judgment respondent now respectfully asks this Court to affirm.

Respectfully submitted,

RALPH H. CASE,
Attorney for Respondent,
LAMM LUMBER COMPANY.

SUPREME COURT OF THE UNITED STATES.

Nos. 245, 246, 247.—October Term, 1938.

245	United States, Petitioner, *vs.* The Algoma Lumber Company.	On Writs of Certiorari to the Court of Claims.
246	United States, Petitioner, *vs.* Forrest Lumber Company.	
247	United States, Petitioner, *vs.* Lamm Lumber Company.	

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

Decision of these cases turns on the question whether certain contracts for the sale of timber on land of the Klamath Indian Reservation in Oregon, executed by the Superintendent of the Klamath Indian School by authority of an Act of Congress, are contracts of the United States upon which suits may be maintained in the Court of Claims.

Section 7 of the Act of Congress of June 25, 1910, 36 Stat. 855, 857, provides that the "timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct". Section 8 of the Act provides that "The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

The present suits were brought in the Court of Claims by respondents against the United States to recover alleged overpayments of amounts due upon contracts for the purchase of timber upon certain unallotted and allotted Indian lands in the Klamath Reservation. The contracts were executed pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior. They provided that the prices fixed for the timber to be cut should be readjusted by the Commissioner of Indian Affairs at intervals of three years, but that permitted increases in price should "not exceed 50 per cent of the increase in the average mill run wholesale net value of lumber . . . during the three years preceding January 1 of the year in which the new prices are fixed."

The Court of Claims in each case found that prices fixed by the Indian Commissioner had exceeded the permitted increases and that in consequence there had been an overpayment of the amounts due under the contracts. It held that they were contracts of the United States and in each case gave judgment against the government for the amount of the overpayments. *Algoma Lumber Company* v. *United States*, 86 Ct. Cls. 226; *Forrest Lumber Company* v. *United States*, 86 Ct. Cls. 188; *Lanum Lumber Company* v. *United States*, 86 Ct. Cls. 171. We granted certiorari, — U. S. —, the questions involved being of public importance in the administration by the United States of Indian lands and in defining the jurisdiction of the Court of Claims.

The petitions for certiorari challenged the jurisdiction of the Court of Claims in terms sufficiently broad to raise the question, not considered below or argued here, whether, assuming the contracts were obligations of the United States, as the court below held, suits to recover the overpayments are upon quasi contracts or contracts "implied in law" not within the jurisdiction conferred on the Court of Claims by § 145(1) of the Judicial Code, 28 U. S. C. § 250(1).[1] *Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Minn. Investment Co.*, 271 U. S. 212; *Goodyear Co.* v. *United States*, 276 U. S. 287. But the question chiefly discussed in brief and argument before us is whether the contracts in suit are obligations of the United States, so as to give rise to claims founded

[1] "The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon . . . any contract, express or implied, with the Government of the United States . . ."

upon them within the jurisdiction of the Court of Claims. As determination of this question is decisive of the case, we do not consider whether, even if the contracts were obligations of the United States, the claims are for the recovery of unjust enrichment upon contracts "implied in law" not within the jurisdiction of the court.

For purposes of decision the contracts in No. 245, *United States* v. *Algoma Lumber Company*, may be taken as typical of those in the other cases. Pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior adopted June 9, 1911, timber upon designated lands within the Klamath Reservation was offered for sale. Bids submitted by respondent, Algoma Company, were accepted, and on July 28, 1917, the contract of sale was executed by the company and by the Superintendent of the Klamath Indian School, pursuant to departmental regulations, and was approved by the Assistant Secretary of the Interior on September 14, 1917.

The area designated embraced approximately 15,700 acres, all of which were unallotted except 2,240 acres of allotted lands. The contract provided for the sale of the timber on the unallotted lands upon terms and conditions not now material. It required that the purchase money be paid to the Superintendent "for the use and benefit of the Klamath Tribe", and that the Algoma Company enter into separate contracts with the individual Indian allottees who desired to sell the timber standing on their allotments. In carrying out the provisions of the contract the Algoma Company, with the approval of the Secretary, entered into separate contracts with twenty-one individual allottees for purchase of the timber on their allotments upon terms similar to those of the contract for the purchase of timber on the unallotted lands.

As required by the contracts, the purchase payments by the Algoma Company, including the alleged overpayments, were made to the Superintendent for the benefit of the Indians. Pursuant to the Act of March 3, 1883, 22 Stat. 582, 590, as amended May 17, 1926, 44 Stat. 560, all moneys received from the unallotted lands, less expenses, were deposited by the Superintendent in the treasury of the United States in an account designated "Indian Moneys, Proceeds of Labor." Payments for timber on the allotted lands, less expenses, were deposited by the Superintendent in private state banks and credited on his own books to the allottees according to their

respective interests. Act of July 1, 1898, 30 Stat. 571, 595; Act of April 30, 1908, 35 Stat. 70, 73; Act of June 25, 1910, 36 Stat. 855, 856. All the proceeds of sale are required to be held and used by the Secretary for the benefit of the Indians. Act of March 2, 1887, 24 Stat. 449, 463; Act of May 18, 1916, 39 Stat. 123, 158; Act of Mar. 2, 1907, 34 Stat. 1221; Act of May 25, 1918, 40 Stat. 561, 591.

The Klamath Reservation was set apart as tribal lands under the Treaty with the Klamath Tribe of February 17, 1870, 16 Stat. 383, from lands immemorially possessed by them. See *United States* v. *Klamath Indians*, 304 U. S. 119, 121 Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians. *United States* v. *Klamath Indians*, 304 U. S. 119; cf. *United States* v. *Candelaria*, 271 U. S. 432; *Mott* v. *United States*, 283 U. S. 747; *Chippewa Indians* v. *United States*, 301 U. S. 358, 375; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. The United States acquired no beneficial ownership in the tribal lands or their proceeds, and however we may define the nature of the legal interest acquired by the government as the implement of its control, substantial ownership remained with the tribe as it existed before the treaty. *United States* v. *Shoshone Tribe, supra*, 116.

The action of Congress in authorizing the sale of the timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the means chosen for the exercise of the power of the government to protect the rights and beneficial ownership of the Indians. The means are adapted to that end. Neither the United States nor any officer purporting to act on its behalf is named a party to the contract. By its terms the contract is declared to be entered into "between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part" and the Lumber Company, "party of the second part." It is thus on its face the contract of the Klamath Indians executed by the Superintendent, acting as their agent. The form of the contract and the procedure prescribed for its execution and approval conform to the long-established relationship between the government and the Indians,

under which the government has plenary power to take appropriate measures to safeguard the disposal of property of which the Indians are the substantial owners. Exercise of that power does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such a purpose. See *In re Sanborn*, 148 U. S. 222, 227; *Turner* v. *United States*, 248 U. S. 354, 359. In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

Respondents point only to § 7 of the Act of 1910 and the regulations prescribed under it as compelling a different result. They argue that the requirements that the manner of sale be prescribed by the Secretary, that the contracts be executed by the Superintendent and approved by the Secretary, and that the prices of lumber be fixed by the Indian Commissioner, indicate a purpose to make the United States, acting as guardian or trustee of the Indians through the Secretary and Superintendent, the contracting party. But, as we have said, all that was done by the government officials in supervising the execution of the contracts and their performance was consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the purchasers of the timber, and no implied obligation on its part arises from the performance of that function.

Before the Act of 1910, the Act of February 16, 1889, 25 Stat. 673, had given the President authority, from year to year, under such regulations as he might prescribe, to authorize the Indians on reservations or allotments to sell dead timber, standing or fallen, on such reservations. The contracts authorized were to be those of the Indians and not of the United States. See *Pine River Logging Co.* v. *United States*, 186 U. S. 279.[2]

The Act of 1910 enlarged the authority conferred by the earlier act so as to permit the sale of living timber on the reservations under regulations prescribed by the Secretary of the Interior. It

[2] In some instances Congress has passed special acts conferring jurisdiction on the Court of Claims to entertain suits brought against the Indians on their contracts. 35 Stat. 444; 36 Stat. 287; see Green v. Menominee Tribe, 233 U. S. 588; cf. 26 Stat. 636; 27 Stat. 86; 35 Stat. 457; 36 Stat. 287.

did not command departure from the earlier practice of selling the timber by contracts entered into between the Indians and the purchasers, and it seems clear that in prescribing that the contracts be entered into with the Indians the Secretary adhered to this practice, but with the added safeguard that the contracts were to be effected for them through the agency of the Superintendent who, for many purposes, acts as the agent of the Indians. See *United States* v. *Sinnott*, 26 Fed. 84, 86; cf. *Parks* v. *Ross*, 11 How. 362, 374.

We do not stop to inquire whether the government could confer authority upon him to execute contracts binding upon the Indians, or whether the Act of 1910 dispensed with the formalities required of contracts with the Indians by R. S. § 2103, 25 U. S. C. § 81, omitted in the case of the present contracts. See *Green* v. *Menominee Tribe*, 233 U. S. 558. Infirmities, if any, in respondents' contracts with the Indians could not impose on the United States a liability which the contracts do not purport to undertake in its behalf.

As the Court of Claims found that the contracts for the sale of timber on allotted lands were entered into by individual allottees as prescribed by § 8 of the Act of 1910, they stand on no different footing, as obligations of the United States, from the tribal contract or similar contracts entered into under the Act of 1889.

Since none of the contracts in suit were contracts or obligations of the United States, it is plain that receipt, by the Treasury of the United States, of payments made under them to the Superintendent for "the use and benefit" of the Indians, even though made under protest, gave rise to no contract for repayment implied in fact on the part of the United States, and that the cause of action, if any, is not within the jurisdiction of the Court of Claims. *Merritt* v. *United States, supra; United States* v. *Minn. Investment Co., supra; Goodyear* v. *United States, supra*.

Reversed.

Mr. Justice McReynolds and Mr. Justice Roberts took no part in the consideration or decision of this case.

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